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# **Between Charity, Welfare, and Warfare: A Disability Legal Studies Analysis of Privilege and Neglect in Israeli Disability Policy**

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“Hidden and disregarded for too long, we are demanding not only rights and equal opportunity, but are demanding that the academy take on the nettlesome question of why we’ve been sequestered in the first place.”<sup>1</sup>

## INTRODUCTION

Throughout the last century, the modern welfare state has been widely considered a major source of rescue and relief for people with disabilities. By providing mechanisms of cure and care, so the common view goes, the welfare state has improved the social conditions of disabled people, rescuing them from a life of starvation and severe destitution. In this view, welfare provides a refuge, while the real responsibility for the persistent poverty of disabled people lies primarily with the structure of the market economy, with the existence of negative social attitudes, and with disability’s “objective” and inherent limitations.

In this Article, I challenge this view, arguing that although welfare has indeed provided some relief to people with disabilities, welfare laws and policies have also had a significant role in developing, furthering and reinforcing the power hierarchies to which people with disabilities are

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1. SIMI LINTON, CLAIMING DISABILITY: KNOWLEDGE AND IDENTITY 185 (1998).

subjected. Through an investigation of Israeli disability policy, I show how hierarchies of welfare benefits reflect national values and collective imageries but at the same time reinforce and re-constitute those values and modes of imagination. Although the particularities and contexts of these hierarchies differ from one country to another, the result, I contend, is the same: those at the top, usually disabled veterans and disabled workers, enjoy better compensation or social insurance schemes, but in fact suffer from similar patterns of ableism and power as other disabled persons, and these patterns eventually render them equally inferior to and of a lesser value than the non-disabled.

This article uses a critical perspective that I term Disability Legal Studies (DLS) in order to emphasize its commitment to the field of critical legal theory and its close association with disability studies. Disability studies, a relatively new academic field, investigates issues such as the social construction of disability, ableism and the power structure that supports and enhances the privileged status and conditions of non-disabled persons in relation to disabled persons, the genealogy of social categories such as normalcy, and the politics of bodily variations.<sup>2</sup> The basic approach that all disability studies scholars share is that disability is not an inherent, immutable trait located in the disabled person, but a result of socio-cultural dynamics that occur in interactions between society and people with disabilities.<sup>3</sup> Although disability studies' critique is not altogether new to some legal scholars, it has not yet gained adequate recognition in legal discourse. I maintain that the time has come to identify, introduce, and label the field of DLS, bring it to light, attend to its premises, and incorporate its lessons into legal theory and practice.<sup>4</sup> I further suggest that attending to DLS would bring a shift in writing on disability and the law from a focus on doctrinal analysis or policy advocacy, to a research regarding the constitutive role of law in the production of disability.

Part I of this Article outlines the contours of Disability Legal Studies, and situates my research within this field. I suggest that DLS should incorporate the aspirations of a disability studies critique with a thick sociolegal analysis. Such analysis is committed to a contextual and

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2. For an overview of the tenets of disability critique including ableism, see *infra* Section I.A.

3. This fundamental argument is part of the distinction drawn in disability studies between the medical model and the social model of disability. For a more detailed discussion, see *infra* Part I, particularly notes 21-26 and accompanying text. A preliminary list of renowned works in the field include LENNARD J. DAVIS, ENFORCING NORMALCY: DISABILITY, DEAFNESS, AND THE BODY (1995); LINTON, *supra* note 1; MICHAEL J. OLIVER, THE POLITICS OF DISABLEMENT: A SOCIOLOGICAL APPROACH (1990); and SUSAN WENDELL, THE REJECTED BODY: FEMINIST PHILOSOPHICAL REFLECTIONS ON DISABILITY (1996).

4. Incorporating the lessons of disability critique into legal education is a radical move as it seeks to transform mainstream legal education. In the context of disability it is an act of resistance, since usually people with disabilities are expected to be mainstreamed into the "normal" education system. Shifting the burden of mainstreaming from the individual person to social institutions is a first step in employing disability critique, as I shall soon explain.

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relational approach and is guided by constitutive theory's methodology. This Part also addresses the tendency of recent disability critiques of law to neglect issues related to welfare policy, particularly cash benefits, viewing them as anachronistic and perhaps contradictory to the rights project. My research proposes that welfare is an important arena for analysis and that DLS should reengage in its study.

Parts II, III, and IV delve into the structure and manifestations of Israeli ableism. In order to understand how disability was constructed, contested, and imagined over the years, I turn to the specifics of its formation: the conditions in which it was situated, the relationships that shaped it, and the institutional settings in which it was produced. Although Israel sees itself as a society that takes care of its disabled, it has in fact neglected, excluded and marginalized people with disabilities. It is within this gap between self-image and reality, I propose, that Israeli social welfare laws constitute "disability." The common view that Israel cares for people with disabilities is pertinent primarily with regard to Israel Defense Forces (IDF) disabled veterans, who enjoy a most privileged position in terms of social glory, extensive benefits, a powerful organization, and a strong political lobby.<sup>5</sup> Yet that view has also been extended, particularly in the past, to additional groups of people with disabilities due to Israel's ethos of a modern welfare state with a strong socialist background, which guarantees work injury benefits and general disability insurance to its citizens.<sup>6</sup>

In this Article I show that people with disabilities in Israel are subjected to two interrelated systems of power, which mutually inform one another and together contribute to the overall marginalization and exclusion of *all* people with disabilities. One concerns the construction of difference between disabled and non-disabled people; the second is the division and fragmentation among three main categories of people with disabilities: disabled veterans, the work-injured, and the general population of people with disabilities.<sup>7</sup> I argue that even veterans' disability is eventually understood as inferiority, and efforts to compensate them do not manifest acceptance of disability but rather its rejection and denial. My study of

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5. For a detailed discussion on IDF disabled veterans' benefits and social status, see *infra* Section IV.B. On the struggles of additional groups to enjoy similar benefits and social esteem, see *infra* Subsection IV.B.5.

6. That view has changed throughout the years with the erosion of the Israeli welfare state in the decades since the 1970s. Most recently, following vocal campaigns led by people with disabilities in 1999 and 2002, the public in Israel has realized that people with disabilities living on social security suffer from severe destitute. But since my critique is directed at the very roots of the Israeli welfare state, it is enough that the popular view was true for a long period of time.

7. Clearly, additional hierarchies inform the structure of ableism in Israeli society and elsewhere, including the intersection of disability with other social categories, such as gender, race, nationality, ethnicity (which I do address here to a certain extent), and more. Additional types of hierarchies are based on types of impairments, illnesses, and disabilities. Yet these are outside the scope of this specific article, which focuses on hierarchies related to circumstances of disablement.

Israeli ableism focuses primarily on the site of social welfare policy, and is located in a specific era—the first decade after the establishment of the State of Israel. The importance of this decade in the history of Israeli disability policy is enormous, as it created the foundation for subsequent eras, and its vestiges informed future policies.

Part II provides a general introduction to the differentiated structure of welfare benefits for people with disabilities. It examines the history of the National Insurance Law<sup>8</sup> (the central social insurance mechanism in Israel), which established only a work injury program and neglected to create a general disability insurance program. By that omission, I argue, it legitimized the growing differentiation between various groups of people with disabilities.

Part III examines the first and principal layer of Israeli ableism, the power-relations between disabled and non-disabled people. It focuses on the relationships between the inferiority of the Sa'ad system (a public assistance mechanism) to which the majority of people with disabilities were subject in Israel's first decades of statehood, and the inferiority of disability itself in Israeli society. In order to understand the roots of that neglect, I explore the essential role that productivity played in the design of Israeli welfare policy in general, and of disability policy in particular, and argue that social welfare became a major field in which Israel's understanding of disability was constituted, as it institutionalized and legalized a hierarchy of power.

Part IV examines the role of the welfare system in reinforcing and furthering the value-based hierarchies that operate *internally* among three main groups of people with disabilities in Israel. It shows that some people with disabilities were not considered as inferior and unproductive as others, because their disability was a product of fulfilling the collective tasks of nation-building, namely labor and defense. The result was a hierarchy in which IDF disabled veterans (*Nechei Tzahal*) were located at the top, work-injured (*Nechei Avoda*) were situated in the middle, and the majority of people with disabilities were positioned at the bottom. The details of the programs are revealing, as they expose the different spheres of disability that were employed in different contexts. They also expose the complex reality in which some people with disabilities were elevated at the expense of others, not solely in material terms, but also in symbolic and political respects.

Finally, I expose the role of the law in maintaining and reinforcing the above hierarchies and in deepening and broadening the material, symbolic, and political gaps that resulted from them. The law was not passive, merely reflecting societal views and norms, but rather an active participant in shaping the various meanings of disability that were employed in

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8. National Insurance Law, 5714-1954, 8 LSI 4 (1953-54).

different spheres and a significant contributor to the power structure that supports ableism.

I conclude with the claim that during its first decade the Israeli welfare system has expressed a view of disability as inferiority, a condition which deserves pity and mercy but not human dignity. I also provide insights into the future of disability policy and activism, which show the significance of this first decade.

### I. ENTER DISABILITY LEGAL STUDIES

“Enter disability studies: a location and a means to think critically about disability, a juncture that can serve both academic discourse and social change. . . . Disability studies takes for its subject matter not simply the variations that exist in human behavior, appearance, [and] functioning, . . . but, more crucially, the meaning we make of those variations. . . . [It is a new paradigm] used to understand disability as a social, political, and cultural phenomenon.”<sup>9</sup>

Since the beginning of the 1990s, just like other academic domains, the legal field has witnessed a rapid growth in writing on disability from a critical perspective. The rising power of the global movement of disability rights,<sup>10</sup> and the increasing influence of the Americans with Disabilities Act (ADA)<sup>11</sup> as a model for civil rights legislation for people with disabilities,<sup>12</sup> have altered the boundaries of the legal discourse to accommodate the new claims of people with disabilities for equal citizenship. In addition, the emergence and growth of disability studies, a critical perspective which powerfully challenged the place and meaning of disability in society, have contributed to a transformation in the understanding of disability from a given category to a subject of contestation and interrogation.<sup>13</sup> The utilization of law for the promotion of social change was not new in the realm of disability, but it has intensified and transformed with the introduction of disability rights.

As disability studies has moved from the margins to more visibility and distinction,<sup>14</sup> the understanding of the relationships between disability and

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9. LINTON, *supra* note 1, at 1-2.

10. Katharina Heyer, *From Special Needs to Equal Rights: Japanese Disability Law*, 1 *ASIAN-PAC.L. & POL'Y J.* 7 (2000) (on the impact of international standards relating to disability on Japanese disability law); Arlene S. Kanter, *The Globalization of Disability Rights Law*, 30 *SYRACUSE J. INT'L L. & COM.* 201 (2003).

11. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C. §§ 12101-12213 (2000)).

12. Stanley S. Herr, *Reforming Disability Nondiscrimination Laws: A Comparative Perspective*, 35 *U. MICH. J.L. REFORM* 305 (2002) (examining the effect of the ADA on disability reform in Israel, the United Kingdom and Sweden); Katharina C. Heyer, *The ADA on the Road: Disability Rights in Germany*, 27 *LAW & SOC. INQUIRY* 723 (2002).

13. On the tenets of disability studies, see *infra* Section I.A.

14. The emergence of disability studies as a distinct academic field can be traced back to the

the law has grown more sophisticated, though the infusion of disability theory into the scholarship has been quite slow.<sup>15</sup> A gradual shift can be traced from the traditional doctrinal analysis that adopted the view that discrimination on the basis of disability is forbidden,<sup>16</sup> to a more elaborated understanding of people with disabilities as a minority group, along with growing attention to disability as a social construct.<sup>17</sup>

I maintain that the time is ripe to identify and mark this emerging field of inquiry as *Disability Legal Studies*. In this term I refer to the two fields to which the field is related: disability studies and critical legal theory. By critical legal theory I refer to schools of thought within the law (including critical legal studies, feminist and queer legal theory, critical race theory, and socio-legal studies) that seek to expose the relationships between law and power, claiming that the law is not neutral or value-free but rather an active participant in power dynamics.<sup>18</sup> In the context of disability this commitment to the study of power mandates a shift from treating disability as a given category to studying the production of dis/ability and the ways power and knowledge participate in its formation. It requires focusing on the social and cultural construction of disability, including, primarily, resisting the overpowering medicalization and pathologization of disability and abandoning its view as an individual misfortune.

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1970s, but it became organized, institutionalized, and influential during the 1990s. See LINTON, *supra* note 1; Lennard J. Davis, *Introduction to THE DISABILITY STUDIES READER 1* (Lennard J. Davis ed., 1997); David Pfeiffer, *A Bit of History*, 21 *DISABILITY STUD.* Q. 1 (2001).

15. Mary Crossley, *The Disability Kaleidoscope*, 74 *NOTRE DAME L. REV.* 621, 627 (1999) (noting that “[u]nlike its race and gender counterparts, . . . disability theory by and large has not filtered into the legal literature on disability”).

16. See, e.g., Peter David Blanck & Mollie Weighner Marti, *Attitudes, Behavior and the Employment Provisions of the Americans with Disabilities Act*, 42 *VILL. L. REV.* 345 (1997); Robert L. Burgdorf, Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 *HARV. C.R.-C.L. L. REV.* 413 (1991); Robert L. Burgdorf, Jr., “Substantially Limited” Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability, 42 *VILL. L. REV.* 409, (1997); Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 *HARV. C.R.-C.L. L. REV.* 99, 160 (1999); Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 *BERKELEY J. EMP. & LAB. L.* 91 (2000); Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 *DUKE L.J.* 1 (1996); William J. McDevitt, *Defining the Term “Disability” Under the Americans with Disabilities Act*, 10 *ST. THOMAS L. REV.* 281 (1998).

17. See, e.g., Crossley, *supra* note 15; Mary Crossley, *Reasonable Accommodation as Part and Parcel of the Antidiscrimination*, 35 *RUTGERS L.J.* 861 (2004); Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 *BERKELEY J. EMP. & LAB. L.* 19 (2000); Jonathan C. Drimmer, *Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities*, 40 *UCLA L. REV.* 1341 (1993); Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations As Antidiscrimination*, 153 *U. PA. L. REV.* 579 (2004).

18. For a detailed analysis of critical legal theory, see IAN WARD, *AN INTRODUCTION TO CRITICAL LEGAL THEORY* (2nd ed. 2004). For collections providing a general overview of critical legal theory through variety of essays and approaches, see *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* (David Kairys ed., 3rd ed. 1998); and *RADICAL CRITIQUES OF THE LAW* (Stephen M. Griffin & Robert C.L. Moffat eds., 1997).

*A. Disability Studies—A Paradigm Shift*

The intellectual home of DLS is disability studies. This is the base from which a DLS analysis departs and by which it is guided. A DLS critique can and should borrow its tools from other legal critical theories, such as feminism, critical race theory and queer theory, and be inspired by their contribution to legal scholarship.<sup>19</sup> But disability critique does offer a unique perspective through which to examine the social, cultural, and legal arenas. Part of this distinctiveness is that it stems from the life experiences of people with disabilities and that people with disabilities are active participants in its formation.

A central mechanism of domination explored in disability-centered inquiries is *ableism*, the power structure that, like sexism and racism, renders one group of persons—people with disabilities or disabled persons—inferior to and dominated by another—the non-disabled or “able-bodied.”<sup>20</sup> Disability studies explores how ableism has shown up in social practices and institutions that have in turn portrayed people with disabilities as useless, marginal, abnormal, a burden on society, and perhaps most offensively, as living a life that is not worth living.

The primary tenet of disability studies is the argument that disability is socially constructed and not an inherent, objective, or fixed trait that resides within the disabled person. Disability studies uses this core proposition to distinguish between the individual/medical model and the social model of disability.<sup>21</sup> The individual/medical model refers to the view of disability as a personal tragedy and a burden, as a medical condition and an immutable trait, located in the disabled person’s physical body.<sup>22</sup> Under this view disability is a pathology, an abnormality that

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19. See, e.g., Melissa Cole’s fascinating analysis of the closeting of people with disabilities in the post-ADA era, which is highly inspired by queer theory. Melissa Cole, *In/ensuring Disability*, 77 TULANE L. REV. 839 (2003).

20. On ableism, see LINTON, *supra* note 1, at 9; and Paul Abberley, *The Concept of Oppression and the Development of a Social Theory of Disability*, in *DISABILITY STUDIES PAST, PRESENT AND FUTURE* 160 (Len Barton & Mike Oliver eds., 1997). In this Article, I mostly use the term “people with disabilities” and sometimes “disabled people.” Although there is a debate within the disability community which one is preferable, I find them both useful in conveying the message that a person’s identity cannot be reduced to her disability (e.g., handicapped, retarded, mentally sick, and other denigrating terms). However, I do find non-disabled a much better term than able-bodied to denote the majority as it puts disability as the reference point in social relations.

21. That distinction was first developed in British grassroots organizations and was introduced to academic audience by Michael Oliver. See OLIVER, *supra* note 3; MICHAEL J. OLIVER, *UNDERSTANDING DISABILITY: FROM THEORY TO PRACTICE* 30-42 (1996). For additional general materials that support the following review of the social and the medical model, see CLAIRE H. LIACHOWITZ, *DISABILITY AS A SOCIAL CONSTRUCT* (1988); LINTON, *supra* note 1; and WENDELL, *supra* note 3. For a good review of the differences between the models, see Crossley, *supra* note 15, at 649-660.

22. For additional reading to the list above on the medical model, see Simon Brisenden, *Independent Living and the Medical Model of Disability*, in *THE DISABILITY STUDIES READER: SOCIAL SCIENCE PERSPECTIVES* 20 (Tom Shakespeare ed., 1998); and Simi Linton et al., *Disability Studies: Expanding the Parameters of Diversity*, 47 RADICAL TEACHER 4 (1995).

defines the person's role in the social world;<sup>23</sup> one's personhood is reduced to one's disability.<sup>24</sup> This view, which was shaped by the mutual growth of nineteenth-century scientific discourse and the expansion of the modern administrative welfare state, perceives the individual as a locus of permitted interrogation and intervention, a subject to imposed practices of cure and care. It assumes that the individual is a problem that should be fixed, adapted, rehabilitated, and "mainstreamed" to fit social norms. The role of society in disabling persons within this discourse remains unnoticed.

In contrast, the social model focuses on the complex ways that economic relations, cultural meanings, social practices, and institutional settings participate in the disablement of persons. It explores how the many daily activities and basic pleasures that people with disabilities cannot enjoy are rooted not in their own limitations, but in the way society was designed—by the non-disabled and for the non-disabled. And it is that design that *socially* burdens people with disabilities—not their biological impairments. Disability, then, is a social construct, a product of social relations and interactions; it is a difference that was constituted by society and that was, and still is, magnified and translated into a power structure.<sup>25</sup>

But the simplicity of the distinction between the medical and social models of disability is also its weakness. Taking an extreme view in this regard might invite oversimplification, such as the denial of pain, suffering, dependency, and other bodily and functional limitations that impairments entail, or the risk of disregarding the multifaceted relations between impairment and disability, and between the social and the biological experiences of impairment/disability.<sup>26</sup> To me, it seems that the

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23. That kind of understanding of disability is usually attributed to the American sociologist Talcott Parsons who argued that "good health" is the normal state of being while sickness and impairment are deviations from the normal, thus assigning to people with disabilities the "sick role." Colin Barnes, *A Legacy of Oppression: A History of Disability in Western Culture*, in *DISABILITY STUDIES PRESENT, PAST AND FUTURE*, *supra* note 20, at 3, 4 (citing TALCOTT PARSONS, *THE SOCIAL SYSTEM* (1951)).

24. That reduction is commonly exemplified through the naming of people with disabilities. While the old terminology address people with disabilities by their impairment, e.g. retarded, blind, autistic, crazy/insane/mentally ill, a terminology that is also used in society as a denigrating way, the new terminology under the social model emphasized personhood of which disability is just one aspect (i.e. a person with disability, with Down syndrome, or with mental disability, or a disabled person, blind person, and so forth). These terminologies are not free of debate within the disability community, yet they do signify a shift in the field. See LINTON, *supra* note 1, at 9-14; WENDELL, *supra* note 3, at 11-35 (on the politics of defining disability and who is disabled); see also Crossley, *supra* note 15, at 647.

25. The social model is in fact an umbrella term for many variations within disability studies. David Pfeiffer, for instance, has identified nine different models of disability studies, including: the social constructionist-, the social-, the impairment-, the oppressed minority, the independent living-, the post-modern-, the continuum-, the human variation-, and the discrimination versions. David Pfeiffer, *The Philosophical Foundations of Disability Studies*, 22 *DISABILITY STUD. Q.* 3 (2002).

26. This is an increasing concern among disability scholars. See, e.g., Tom Shakespeare & Nicholas Watson, *The Social Model of Disability: An Outdated Ideology?*, 2 *RES. SOC. SCI. & DISABILITY* 9 (2002) (claiming that the success of the social model became a problem in itself, calling for another paradigm shift in disability theory, and arguing that just as feminist theory abandoned the

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point of the social critique is not to deny the pain, but rather to realize that the social meaning attached to pain and impairment/disability is the source of people with disabilities' perceived inferiority and not their "inherent" condition.

The move to the social and the political also implicates the law in various ways. Focusing on the place of law in that scheme of power exposes ableism as a legalized system: a system of stated and unstated norms that have been codified into legal arrangements, whether by addressing people with disabilities or by ignoring them. Consequently, the profound and distinctive power of law to generate disablement, to exclude, and to confine, by defining rights, entitlements, and duties, is revealed. By legalizing ableism the law becomes constitutive of disability in itself. At the same time, that shift can also lead to a greater explicit mobilization of the law to redress the wrongs of the past, to become an apparatus of change, a source of hope, and a tool in reconstructing society.<sup>27</sup>

#### 1. Law and the social construction of disability

One way to start thinking critically about the role of law in generating disablement is through engagement with the social construction of disability in its broadest sense. An easy example to begin with is accessibility and accommodation. By either providing or denying accessibility, by defining the lines between reasonable and unreasonable claims for accommodations, the law continues to play a significant role in generating disablement even in the age of disability rights. But in the context of this article, which focuses on social welfare policy, it is important to stress the complex ways that law and society disable people beyond accessibility and accommodations. Susan Wendell has provided a detailed picture of these and additional dimensions of the social construction of disability, including the generation of disabling events and circumstances through war, crime, technology, and innovation; socio-environmental factors, such as abuse and neglect of children, public-safety standards, pollution, stress, and poverty; the availability and distribution of basic resources such as water, food, shelter, and clothing; and the availability and forms of medical care and practices.<sup>28</sup> To all these forms

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strict binary between sex and gender, so should disability studies abandon the social/medical and the disability/impairment binaries (the disability/impairment binary as developed by disability studies literature suggests that *impairment* stands for the biological condition that a person might have, and *disability* signifies the social and cultural barriers that are imposed on that person in various ways due to the impairment)).

27. These two directions are not necessarily contradictory, as the work of critical race theory on multiple consciousness demonstrates. See Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 329 (1987).

28. WENDELL, *supra* note 3, at 36-42; see also Paul Abberley, *The Concept of Oppression and the Development of a Social Theory of Disability*, 2 DISABILITY, HANDICAP & SOC'Y 5 (1987) (on the role of poverty, work, and other social factors in disabling persons).

of disablement the contribution of law is undoubtedly profound.

## 2. Law and the cultural production of disability

The cultural production of disability is a complementary dimension of the social critique in the study of dis/ability as a system of power. Such a cultural critique focuses on meanings, language, and images that inform the social barriers that people with disabilities encounter, and that in turn are reinforced by them.<sup>29</sup> It exposes the roots and manifestations of the unstated norms that underlie disabling social practices and structures, showing their contingency and instability. Disability critique of this sort unpacks and challenges popular representations of people with disabilities as inferior and worthless and as deserving pity and mercy by identifying the cultural patterns that produce those images.<sup>30</sup> It also challenges the confinement of the meaning of disability to negative attributes such as deficiency, burden, ill fate, deviance, deformity, and the related inability to imagine anything but negative aspects in the experience of disability.<sup>31</sup> Here as well, the role of law in shaping and maintaining those unstated norms has largely been ignored. The question for the law is what cultural assumptions and images inform its texts and are informed by them. Such an analysis goes beyond the generation of disablement to the very meaning of disability.

## 3. Transforming the academy

Simi Linton in her seminal work *Claiming Disability* provided a comprehensive manifesto for the inclusion of disability studies' critique

29. On the role of language and the power of naming, see LINTON, *supra* note 1, ch. 2; Irving Kenneth Zola, *Self, Identity and the Naming Question: Reflections on the Language of Disability*, 36 SOC. SCI. & MED. 167 (1993); and Michael Oliver, *Politics and Language: Understanding the Disability Discourse* (1994), <http://www.leeds.ac.uk/disability-studies/archiveuk/Oliver/pol%20and%20lang%2094.pdf>. On the role of disability as a literary device, see David T. Mitchell, *Narrative Prosthesis and the Materiality of Metaphor*, in *DISABILITY STUDIES ENABLING THE HUMANITIES* 15 (Sharon L. Snyder et al. eds., 2002). On images and disability, see, for example, Harlan Hahn, *Advertising the Acceptably Employable Image: Disability and Capitalism*, in *THE DISABILITY STUDIES READER*, *supra* note 14, at 172.

30. Disability critique, as Rosemarie Garland-Thomson contends, "questions our cultural fantasy of the body as a neutral, compliant instrument of some transcendent will." Furthermore, it shows how "privileged designations as beautiful, healthy, normal, fit, competent, intelligent . . . provide cultural capital to those who can claim such statuses." Rosemarie Garland-Thomson, *Integrating Disability, Transforming Feminist Theory*, 14 NWSA J. 1, 4-5 (2002); see also Harlan Hahn, *Can Disability Be Beautiful?*, 18 SOC. POL'Y 26 (1988); Michael J. Oliver, *What's So Wonderful About Walking?* (Feb. 9, 1993), <http://www.leeds.ac.uk/disability-studies/archiveuk/Oliver/PROFLEC.pdf>.

31. Thus the missing voice in today's popular culture and academia, is for Simi Linton, a "voice that speaks not of shame, pain, and loss, but of life, delight, struggle, and purposeful action. . . . [Writers are needed who can] demonstrate that for many disabled people, oppression is not experienced as a bodily force, but as a political force." LINTON, *supra* note 1, at 113-14. One such example is in the illuminating words of Neil Marcus, an artist living with dystonia: "Disability is not a 'brave struggle' or 'courage in the face of adversity' . . . [D]isability is an art. It's an ingenious way to live." Disability Social History Project, <http://www.disabilityhistory.org> (last visited Dec. 26, 2005) (quoting *Storm Reading*, an unpublished play by Neil Marcus, information on which is available on the web at New Sun Health Library, "Storm Reading," A Play by Neil Marcus, <http://www.newsun.com/stormreading2.html> (last visited Dec. 26, 2005).

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and disabled people's perspectives and voices in the academic curriculum, and a detailed picture of the directions that disability studies scholarship should take.<sup>32</sup> Although not touching upon legal scholarship at all, Linton's manifesto has a lot to teach the legal academy. Linton challenges the prominence that the applied fields (e.g., social work, healthcare services, rehabilitation, and additional forms of therapy, cure, and care) have gained during the last two centuries as a dominant sphere in which disability was located and its meaning was produced, and from which that meaning was imported to other fields. In order to make disability a category of social, political, and cultural critique, a change that would end the primacy of the applied fields and that would transform the meaning of disability in all fields, Linton calls for disability studies scholarship to be interdisciplinary and focus on the "vast realm of meaning making that occurs in metaphoric and symbolic uses of disability."<sup>33</sup> A related critique in that regard is the absence of agency and subjectivity of people with disabilities, and inadequate attention to wishes and proposals coming from the disability community.<sup>34</sup>

Linton also focuses on the importance of treating disability as a prism through which to investigate general themes and social phenomena. This way disability is not isolated, but rather becomes more relevant and contextualized. Linton shows that existing research usually studies people with disabilities in their particularity, and their particularity is the subject of that research. Similarly, people with disabilities are usually excluded from research on the "general population" for which they are considered too particular and therefore irrelevant.<sup>35</sup> A disability studies approach, in contrast, shows how a disability perspective might enrich our understanding of the world and of broad-spectrum issues, such as body, care, and community.<sup>36</sup> In my own study I engage with issues pertaining to the meaning of productivity, the limits of social welfare policy, and to the understanding of law as a socio-cultural power.

### *B. The Legal Construction of Disability*

#### 1. What is missing in contemporary writing on disability and the law

For legal writing on disability and the law to become a branch of critical legal theory, it must not only adopt the view that disability is a social construct, but also be actively engaged with research that explores the role of law in the social construction and cultural production of disability. This

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32. LINTON, *supra* note 1. The following mentions only part of the many points that Linton is making throughout her book, but I find them most comprehensive and essential.

33. *Id.* at 123-29.

34. *Id.* at 134-35.

35. *Id.* at 73.

36. *Id.* at 117-22.

type of research is clearly not foreign to legal scholarship, but its place is regrettably relatively marginal. The writing of feminist, queer, and particularly critical race theorists provides inspiring examples for integrating this method into legal analysis, particularly in the context of social and legal construction of social groups and its impact on identity formation.<sup>37</sup> As Angela Harris recently suggested, “‘race law’ consists not only of anti-discrimination law, but law pertaining to the formation, recognition, and maintenance of racial groups, as well as the law regulating the relationships among these groups.”<sup>38</sup>

Indeed, contemporary legal scholarship concerning disability is increasingly familiar with the primary research produced by disability studies and with its general conceptual framework. It is particularly familiar with the renowned distinction between the medical/individual model and the social model of disability. However, these concepts are usually employed in an instrumental fashion, mainly to evaluate courts’ decisions, legal policies, and other trends in disability law.<sup>39</sup> Thus, for example, Samuel R. Bagenstos in *The Future of Disability Law* provides a powerful analysis of the limitations of the rights language, as formulated in the ADA, to bring about social change. Yet Bagenstos stresses that his article makes no effort “to offer any deep normative justification for or critique of disability law. My basic goal is more instrumental—to assess which policy tools are most likely to achieve the objectives that the disability rights movement has itself articulated.”<sup>40</sup>

Moreover, most legal scholars prefer to analyze disability using the “minority group model” or the “rights model,” which transforms the social model “into a political call for action.”<sup>41</sup> This perspective is important for

37. See, e.g., DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1987); IAN FIDENCIO HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996); PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991); Richard Delgado, *Two Ways To Think About Race: Reflections on the Id, the Ego, and Other Reformist Theories of Equal Protection*, 89 GEO. L.J. 2279 (2001); Matsuda, *supra* note 27; Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law and Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329 (1991); Reginald Leamon Robinson, *Race, Myth and Narrative in the Social Construction of the Black Self*, 40 HOW. L.J. 1 (1996). For feminist analyses of the legal construction of gender, see Kathryn Abrams, *The Constitution of Women*, 48 ALA. L. REV. 861 (1997); Mary Joe Frug, *A Postmodern Feminist Legal Manifesto (An Unfinished Draft)*, 105 HARV. L. REV. 1045, 1062-63 (1992); and Kenneth L. Karst, *Woman’s Constitution*, 1984 DUKE L.J. 447. For an illuminating analysis in Queer Theory, see Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation” in Euro-American Law and Society*, 83 CAL. L. REV. 1, 346-50 (1995).

38. Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 CAL. L. REV. 1923, 1928 (2000).

39. For a list of such essays, see *supra* note 16.

40. Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1, 7 (2004).

41. See, e.g., Crossley, *supra* note 15, at 659; Diller, *supra* note 17; Drimmer, *supra* note 17, at 1355-1359. For disability studies writing on the minority model, see JAMES I. CHARLTON, *NOTHING ABOUT US WITHOUT US: DISABILITY OPPRESSION AND EMPOWERMENT* 123-124 (1998) (critiquing the civil rights approach); Michelle Fine & Adrienne Asch, *Disability Beyond Stigma: Social Interaction, Discrimination, and Activism*, 44 J. SOC. ISSUES 3, 6-14 (1988); Harlan Hahn, *Antidiscrimination Laws and Social Research on Disability: The Minority Group Perspective*, 14

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the promotion of disability rights, yet it tends to view the law as merely an apparatus of power or an instrument in the struggle for social change, and to see the required change as merely in the content of law (e.g., statutes, judicial doctrines, policy directions). Such a view therefore usually perceives law as separate from society, as a reflection of social relations and cultural meanings. Legal scholarship, then, needs to be more engaged in exploring the legal construction of disability.<sup>42</sup>

By introducing DLS and explicating what it entails I seek to achieve two primary goals. The first goal is to draw the attention of the legal academy, including other critical theorists, to the innovativeness and significance of disability critique to the understanding of law in general and to law and power in particular. Incorporating a disability critique would enhance the research on issues such as citizenship, poverty, autonomy, dependency, competency, and rationality, and would also advance the study of identity, group formation, and intersectionality.<sup>43</sup> The second goal is to invite the scholars who are already engaged in the field to expand their critiques and their views about the relationships between disability and the law.

## 2. Methodological directions

The “constitutive approach” to law, a branch of sociolegal studies, created a theoretical and methodological framework for critical readings of the relationships between law, society, and culture, that can provide a necessary set of tools for a DLS analysis.<sup>44</sup> Influenced by additional critical theories, such an analysis would be founded on a fundamental resistance to grand narratives and a deep suspicion towards taken-for-granted categorical schemes.<sup>45</sup> Thus, this study engages in a critique of productivity as a grand narrative of social welfare policy and questions the

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BEHAV. SCI. & L. 41, 53 (1996); Anita Silvers, *Formal Justice*, in DISABILITY, DIFFERENCE, DISCRIMINATION: PERSPECTIVES ON JUSTICE IN BIOETHICS AND PUBLIC POLICY 13 (1998); and Anita Silvers, *Reconciling Equality to Difference: Caring (for) Justice for People with Disabilities*, 10 HYPATIA 48 (1995).

42. One exception in this regard is Melissa Cole’s work on Gimp Theory. See *infra* note 55 and accompanying text.

43. See, e.g., Karlan & Rutherglen, *supra* note 16 (explaining the potential transformation in employment law following the terminology of the ADA); Anita Silvers, *Reprising Women’s Disability: Feminist Identity Strategy and Disability Rights*, 13 BERKELEY WOMEN’S L.J. 81 (1998) (showing what feminist legal scholars can learn from a disability critique of the law).

44. For essential writings in constitutive theory of law, see JOHN BRIGHAM, THE CONSTITUTION OF INTERESTS (1996); ALAN HUNT, EXPLORATIONS IN LAW AND SOCIETY: TOWARDS A CONSTITUTIVE THEORY OF LAW (1993); MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF POLITICAL MOBILIZATION (1994); and HELENA SILVERSTEIN, UNLEASHING RIGHTS LAW, MEANING, AND THE ANIMAL RIGHTS MOVEMENT (1996).

45. MICHEL FOUCAULT, POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972-1977 (Colin Gordon ed., 1980); JEAN-FRANÇOIS LYOTARD, THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE (1984); MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW (1990); IRIS M. YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE (1990).

differentiated system of disability benefits which established a value-based hierarchy among its recipients. It calls for contextual and relational analysis of law, focusing on the local, on the webs of relation within which every legal category is situated, on the historical construction of these categories, and on listening to voices “from the bottom.”<sup>46</sup>

A constitutive approach also implies a certain understanding of the nature of law. Scholars of constitutive theory do not see the law as one cohesive system of rules operating autonomously of society, but rather as decentered, pluralistic, and inconsistent fields of human action. The law, in this view, is an arena of struggle, a terrain for competition over power and meaning. Within this framework it is impossible to conceive of the law as a command of a sovereign, or a crude ideological tool at the hands of the powerful in society.<sup>47</sup> Nor is it a purely emancipatory mechanism. A complex understanding of law acknowledges that it is “at once imposed from above and created from below,”<sup>48</sup> and that it operates simultaneously as a limiting and an enabling force. As Helena Silverstein explains:

Legal meaning becomes constitutive of society as it permeates, informs, and structures the social realm, that is, as it becomes a part of the way people think, understand, and act. . . . Incorporating legal meaning into thought and action involves reconstruction of legal meaning. Hence, just as legal meaning constitutes individual and social identity, so too does individual and social identity constitute legal meaning. Understanding, speaking and acting in legal ways can re-create and redefine legal meaning. Such reconstruction reverberates back through state institutions where meaning is continually constituted and reconstituted.<sup>49</sup>

The temporal dimension of law in such an analysis is also of importance, since law in constitutive theory is a process, not a static state of affairs. Examining contradictions, indeterminacies, and paths not taken, as Robert W. Gordon suggests,<sup>50</sup> would illuminate how the law participates in the conditioning of the human imagination, and how it “has

46. The methodological directions proposed here are influenced by other related legal approaches, such as feminist contextual and relational analysis of law, *see, e.g.*, MINOW, *supra* note 45; Matsuda, *supra* note 27; Mari J. Matsuda, *Pragmatism Modified and the False Consciousness Problem*, 63 S. CAL. L. REV. 1763 (1990); Martha Minow & Elizabeth V. Spelman, *In Context*, 63 S. CAL. L. REV. 1597 (1990), cultural analysis of law, *see, e.g.*, Naomi Mezey, *Law as Culture*, 13 YALE J.L. & HUMAN. 35 (2001); Austin Sarat & Thomas R. Kearns, *The Cultural Lives of Law*, in *LAW IN THE DOMAINS OF CULTURE* (Austin Sarat & Thomas R. Kearns eds., 1998), and critical legal history, *see, e.g.*, Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 61 (1984).

47. Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HAST. L.J. 805 (Richard Terdiman trans., 1987).

48. SILVERSTEIN, *supra* note 44, at 5; *see also* Bourdieu, *supra* note 47, at 225.

49. SILVERSTEIN, *supra* note 44, at 8.

50. Gordon, *supra* note 46, at 61. Gordon rejects any view that assumes that “there is an objective, determined, progressive social evolutionary path,” *id.* at 63, that “legal systems should be described and explained in terms of their functional responsiveness to social needs,” *id.* at 64, or that “the legal system adapts to changing social needs,” *id.* at 125.

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helped to structure the most routine practices of social life.”<sup>51</sup> Law is therefore not outside of society, reflecting societal views or adjusting to changing social norms, but rather an active participant, a constitutive power, in socio-cultural processes. Law in this view is located *in culture*, *in society*, and *in history*.<sup>52</sup>

As I have already said, this kind of analysis is already performed by legal scholars in other fields of critical theory, yet within disability critiques of law this type of writing is hardly represented. The field, nevertheless, is not without major contributions. One such compelling work, which preceded the blooming of writing on disability and the law, is Martha Minow’s book, *Making All the Difference: Inclusion, Exclusion, and American Law*. In her general critique of law’s concept of difference, Minow incorporates many examples related to disability, including mental health law and special education, claiming that “the name of difference is produced by those with the power to name and the power to treat themselves as the norm” yet people tend to “locate the problem in the person who does not fit in rather than in relationships between people and social institutions.”<sup>53</sup>

Another more recent work is *Rights of Inclusion: Law and Identity in the Life Stories of Americans with Disabilities*, by David Engel and Ralph Munger, which provides a comprehensive view of the constitutive impact that the introduction of the rights language had in identity formation processes among people with disabilities in the United States. In their words, “Although relatively few [of the interviewees] have actually asserted their rights by using the [ADA] many have found their lives and careers changed by the indirect, symbolic and constitutive effects of rights.”<sup>54</sup> Yet Engel and Munger’s project was less about disability critique and more about the constitutive power of law. What is needed then is work that combines socio-cultural analysis of law with disability critique and that is equally committed to the interrogation of both.

Finally, Melissa Cole has recently developed Gimp Theory, which takes the path that this Article suggests. Cole argues that

[t]he initial goal of Gimp Theory is not simply to say that it is bad to create an artificial category of disability, but more searchingly to uncover the unthinking assumptions that social institutions like the insurance industry and the laws that guide its functioning bring to

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51. *Id.* at 125.

52. On the view of law *in culture* and the type of analysis it requires, see Mezey, *supra* note 44; and Sarat & Kearns, *supra* note 44.

53. MINOW, *supra* note 45, at 111.

54. DAVID M. ENGEL & FRANK W. MUNGER, *RIGHTS OF INCLUSION: LAW AND IDENTITY IN THE LIFE STORIES OF AMERICANS WITH DISABILITIES* 4 (2003).

their construction and treatment of disability.<sup>55</sup>

Cole's illuminating analysis utilizes queer critique to examine the role of law in the social construction of disability and focuses on techniques of closeting and covering that the ADA imposes on people with disabilities.

### 3. DLS—A Working Definition

Although it is too soon to define the field and draw its boundaries, the following is an attempt to provide an initial framework for a DLS analysis, one that is instructive but that at the same time allows space for multiple directions of research. A disability legal studies analysis understands disability as a socially constructed category whose diverse meanings, origins, and consequences are a result of power dynamics. The law in this view is an arena of struggle in which the meaning of disability is constantly formed and transformed, contested, negotiated, defied, and interrogated, constrained and liberated. DLS views disability as a primary yet neglected prism through which to examine not people with disabilities in their particularity, but rather in their relation to general sociocultural phenomena, such as the organization of social life, the regulation of human variations, the political economy of difference, and the operation of law. Euthanasia, abortion, sterilization, institutionalization, guardianship, welfare benefits, civil rights, are just a preliminary list of the sites where disability is not only a term to denote a group of persons affected by a certain policy (and therefore should not be discriminated against), but also an organizing principle that permeates the very framing of the issue and that shapes its logic. A critical analysis requires therefore going beyond the question of what entitlements and rights people with disabilities enjoy or denied. It rather mandates engagement with the way legal norms, institutions, and practices shape our understanding of concepts such as normalcy, competence, autonomy, productivity, citizenship, humanity, and power that underlie various legal fields. The law in a DLS analysis is not merely a reflection of social norms or cultural assumptions (even ableistic ones), but rather an active participant in the constitution of social categories and an effective power in making them significant in everyday life.

Before concluding this section it is important to note that the move beyond reform proposals should not mean a turn away from the commitment to social change. I view DLS analysis as typically expressing a deep commitment to social change, even though it would not necessarily take the form of a blueprint for social action. Reforming and transforming the social conditions and relations within which people with disabilities

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55. Melissa Cole, *supra* note 19, at 841; *see also* Melissa Cole, *The Mitigation Expectation and the Sutton Court's Closeting of Disabilities*, 43 *HOW. L.J.* 499, 525 (2000); Melissa Cole Essig, *Gimp Theory and the ADA's "Feedback Loop"*, 49 *ST. LOUIS U. L.J.* 1047 (2005).

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are situated requires an initial stage of identifying and studying the various systems of power in which they are located and the diverse hierarchies of difference that inform them. Therefore, despite seeming impractical, a DLS study would typically be designed with, and motivated by, the hope of informing future legal decision-making and supporting grassroots resistance.

### *C. A Disability Legal Studies Critique of Welfare*

By focusing on social welfare, this article joins the growing literature by disability rights advocates and disability studies scholars critiquing the faults and failures of welfare policy, which has rendered people with disabilities powerless, patronized, dependent, and stigmatized.<sup>56</sup> One type of analysis traces the origins of the place of disability in modern society to the roots of the welfare state. In this analysis the welfare state is constitutive of disability particularly in light of industrialization and the rise of capitalist market economies.<sup>57</sup> In *The Disabled State*, Deborah Stone provides a detailed account of the rise of disability as an administrative category for welfare policy purposes in England, Germany, and the United States. She shows how in England, for instance, the category of disability has evolved as a result of attempts to distinguish between the deserving poor who were allowed to live on charity and the undeserving (“idle”) poor who were expected to work.<sup>58</sup> Her conclusion is that medical concepts do not “objectively” define disability, but were rather used in the service of other interests that resulted in the constitution of disability as a social category.

Another kind of research elaborates on the social construction of disability through patterns of distribution of wealth and resources. In the absence of public funds, socioeconomic gaps become even more imperative in the disablement of the powerless and the poor; if resources are allocated unequally, people who are entitled to less experience more limitations and become more socially disabled than others with similar

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56. It is impossible to list all the works dealing with critique of welfare, as they are vast and numerous. I mention some of them throughout this section and some *supra* in Section I.A. I should add to those a few additional resources that chronicle the struggles of people with disabilities which were largely against the welfare establishment: DORIS ZAMES FLEISCHER & FRIEDA ZAMES, *THE DISABILITY RIGHTS MOVEMENT: FROM CHARITY TO CONFRONTATION* (2003); RICHARD K. SCOTCH, *FROM GOOD WILL TO CIVIL RIGHTS: TRANSFORMING FEDERAL DISABILITY POLICY* (2d ed. 2001) (discussing the enactment of section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a) (2000), the first federal law to prohibit discrimination on basis of disability); and JOSEPH P. SHAPIRO, *NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT* (1993).

57. OLIVER, *supra* note 3, ch. 3; DEBORAH A. STONE, *THE DISABLED STATE* (1984). Deborah Stone provided a most influential scholarship in that regard. Her analysis examines the social construction of the category of disability and its effect on people with disabilities' lives. *See also* Matthew Diller, *Entitlement and Exclusion: The Role of Disability in the Social Welfare System*, 44 *UCLA L. REV.* 361 (1996).

58. STONE, *supra* note 57, ch. 2.

impairments.<sup>59</sup> A critical assessment therefore examines the role of socioeconomic disparities, availability of financial and medical resources, and other social services in treating injuries and illnesses, and even avoiding them.<sup>60</sup> It also explores to what extent welfare policies diminish that disparate impact.<sup>61</sup> An additional contemporary direction of inquiry follows Foucault's concept of power and shows how social welfare is still a major locus of government control, of disciplining and normalizing people with disabilities and their bodies.<sup>62</sup>

In contrast to how vibrantly disability studies has discussed the consequences of welfare for people with disabilities, contemporary disability critiques of law tend to focus less on social processes that occur in the domain of welfare and more on the quandaries posed by new laws providing equal rights to people with disabilities.<sup>63</sup> With some exceptions,<sup>64</sup> disability rights advocates whose projects have tended to focus exclusively on making people with disabilities full rights-bearers and altering the language of rights to include the life experiences of people

59. GARY L. ALBRECHT, *THE DISABILITY BUSINESS* 14 (1992) ("A person's position in society affects the type and severity of physical disability one is likely to experience and more importantly the likelihood that he or she is likely to receive rehabilitation services. Indeed, the political economy of a community dictates what debilitating health conditions will be produced, how and under what circumstances they will be defined, and ultimately who will receive the services"); WENDELL, *supra* note 3, at 36-37; Michael J. Oliver, *Capitalism, Disability and Ideology: A Materialist Critique of the Normalization Principle* 2-5, <http://www.leeds.ac.uk/disability-studies/archiveuk/Oliver/cap%20dis%20ideol.pdf> (last visited Dec. 26, 2005). For a similar claim regarding the link between poverty and health, see Jake M. Najman, *Health and Poverty: Past, Present and Prospects for the Future*, 36 *SOC. SCI. & MED.* 157 (1993).

60. Regina Austin & Michael Schill, *Black, Brown, Poor, and Poisoned: Minority Grassroots Environmentalism and the Quest for Eco-Justice*, 1 *KAN. J.L. & PUB. POL'Y* 69 (1991); Jennifer Pokemoner & Dorothy E. Roberts, *Poverty, Welfare Reform, and the Meaning of Disability*, 62 *OHIO ST. L.J.* 425 (2001) (claiming that disability and illness are distributed in ways that reflect gender, racial, and economic inequalities); Katherine Seelman & Sean Sweeny, *The Changing Universe of Disability*, 21 *AM. REHABILITATION* 2 (1995).

61. OLIVER, *supra* note 21, at 52, 75-77 (claiming that the welfare state had the potential to accord people with disabilities many rights of citizenship, but that it failed them primarily because it provided services on basis of individual need and not on rights)

62. See, e.g., Jenny Morris, *Creating a Space for Absent Voices: Disabled Women's Experience of Receiving Assistance with Daily Living Activities*, 51 *FEMINIST REV.* 68 (1995); Margrit Shildrick & Janet Price, *Breaking the Boundaries of the Broken Body*, 2 *BODY & SOC'Y* 93 (1996) (discussing disciplinary practices in procedures surrounding disability benefits).

63. See Bagenstos, *supra* note 40, at 3 n.4 ("Much of the legal academic commentary on the ADA criticizes various decisions of the Supreme Court and other courts that have narrowed the scope of the ADA.").

64. See Mary Crossley, *Becoming Visible: The ADA's Impact on Health Care for Persons with Disabilities*, 52 *ALA. L. REV.* 51 (2000); Mary Crossley, *Medicaid Managed Care and Disability Discrimination Issues*, 65 *TENN. L. REV.* 419 (1998); Matthew Diller, *Dissonant Disability Policies: the Tensions Between the Americans with Disabilities Act and Federal Disability Benefit Programs*, 76 *TEX. L. REV.* 1003 (1998); Diller, *supra* note 57; Drimmer, *supra* note 17; Pokemoner & Roberts, *supra* note 60; Mark C. Weber, *Beyond the Americans with Disabilities Act: A National Employment Policy for People with Disabilities*, 46 *BUFF. L. REV.* 123 (1998); Mark C. Weber, *Disability and the Law of Welfare: A Post-Integrationist Examination*, 2000 *U. LL. L. REV.* 889; see also Samuel R. Bagenstos, *The Americans with Disabilities Act as Welfare Reform*, 44 *WM. & MARY L. REV.* 921, 930-52 (2003); Bagenstos, *supra* note 40, at 4 n.6 (arguing that "[t]here are remarkably few exceptions to the ADA-centrism of post-1990 academic discussions of disability law" and urging more discussion of social welfare).

with disabilities.<sup>65</sup> Welfare benefits, so it seemed, particularly disability allowances, were regarded as anachronistic, as part of the old regime which was supposed to be replaced.<sup>66</sup>

Hence, by focusing on welfare benefits in this article, I make an additional point about the desirable direction of disability research.<sup>67</sup> First, attention to welfare is important as a temporary measure for those who live in poverty in the meantime. That temporariness derives also from the realization that rights are a process, and not an outcome; that the struggle over social justice is an ongoing one, a never-ending effort.<sup>68</sup> Second, with the exception of the welfare rights movement, which attempted to establish a right to welfare benefits, advocates of rights have largely neglected the “here and now” issues of poverty and unemployment.<sup>69</sup> Yet these issues seem to persist and remain a long-standing matter that needs to be revisited. As such they represent a much deeper challenge to the rights discourse and therefore threaten to destabilize it. Paraphrasing the well-known critique of rights, we should ask: What is the value of an accessible restaurant for a person who cannot pay her meal? What is the meaning of an accommodated hospital for a person who has no healthcare insurance? And indeed, it seems that recently an emerging trend of drawing attention back to social welfare can be identified.<sup>70</sup>

Yet social welfare is not only a material issue. As I show in this article, it also bears symbolic significance and carries political consequences.

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65. See Bagenstos, *supra* note 40, at 3 (“Since its enactment in 1990, the Americans with Disabilities Act (ADA) has dominated discussions of disability law in the legal academy.”); *see also id.* at 5 (“[D]isability rights advocates ultimately [have grown] a great deal more ambivalent about the very idea of welfare . . .”).

66. For two examples of positions against disability allowances, see Silvers, *supra* note 41, who provides a philosophical account; and Oliver, *supra* note 21, at 21-28 who brings an activists’ perspective to bear (in his book Oliver brought to print a historical document created in 1976 by an organization of British activists with disabilities, known as the Fundamental Principles document that was created by the Union of the Physically Impaired Against Segregation (UPIAS) in England).

67. This is also Bagenstos’s claim: “In short, the future of disability law lies as much in social welfare law as in antidiscrimination law.” Bagenstos, *supra* note 40, at 4.

68. SALLY ENGLE MERRY, GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS 145 (1990) (finding, based on field work on rights, that “rights come to be opportunities for action, not guarantees of protection”).

69. On the welfare rights movement, see MARTHA DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960-1973 (1995); and William H. Simon, *Rights and Redistribution in the Welfare System*, 38 STAN. L. REV. 1431, 1436-41, 1486-1504 (1986) (reviewing the interplay between the welfare rights movement and Charles Reich’s conception of the New Property in welfare policy, and their roles in the history of welfare policy). On the contribution of the movement to the enactment of the SSI program, see Diller, *supra* note 17, at 437-38.

70. See Bagenstos, *supra* note 40, at 54-82. Bagenstos identifies a shift in disability practice, in the work of rights advocates on the ground. *Id.* at 55. Yet I see an emerging parallel shift in legal scholarship, as Bagenstos’s own essay indicates. For additional interesting research direction, see Peter Blanck’s writing on the role of post Civil-War pensions to disabled veterans in the history of disability policy. Peter Blanck, *Civil War Pensions and Disability*, 62 OHIO ST. L.J. 109 (2001); Peter Blanck & Chen Song, “Never Forget What They Did Here”: *Civil War Pensions for Gettysburg Union Army Veterans and Disability in Nineteenth-Century America*, 44 WM. & MARY L. REV. 1109 (2003).

Symbolically, it deserves more inquiry as a site in which disability was historically produced and where it keeps reproducing continually. As I explained before, social welfare is one of the most important participants, together with medicine and the related applied sciences, in assigning disability its current meaning. The consequences of social welfare are of great importance for political reasons as well. The configuration of welfare benefits has tremendously impacted the political organization of people with disabilities, rendering them passive and silenced on the one hand, and divided, fragmented, and lacking internal solidarity on the other. Thus, one finds lack of solidarity among people with disabilities in an era where welfare was a dominant paradigm. While disability activism did exist it was largely on a narrow basis of shared impairment or shared circumstances of injury.

In my research I am interested in the general pattern of welfare-based hierarchies among people with disabilities. While this article focuses on Israeli welfare policy, the pattern is basically similar among a variety of societies as disabled veterans are located at the top and then on a sliding scale one finds the work-injured, disabled workers, and the “general” disabled who have always been outside the working system.<sup>71</sup> A contextual analysis requires a thorough examination of the concrete nature and content of those hierarchies in each society. A Disability Legal Studies analysis would ask whether and in what ways the law has participated in forming those hierarchies and how they are related to the overall exclusion and marginalization of people with disabilities.

The hierarchies of disability benefits, the dynamic relations between the material, symbolic, and political dimensions of those hierarchies, and their joint impact on the place of *all* people with disabilities in society are the thrust of this article. They demonstrate, I argue, a more complex understanding of the mutuality of law and society and expose an additional, as of yet unexplored face of ableism.

## II. THE DIFFERENTIATED STRUCTURE OF ISRAELI SOCIAL WELFARE PROGRAMS AND ITS IMPACT ON PEOPLE WITH DISABILITIES

During the first decade of statehood Israel established eleven social welfare programs that provided benefits to people with disabilities. This study focuses on three of these programs, each representing different model of disability benefits. These programs became the foundations of Israeli disability policy.

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71. The differentiation in disability benefits is high in many countries. Thus, in the United States, they include social security for disabled workers, a civil service retirement system for federal employees, a few pension programs for disabled veterans, the railroad retirement system, and many state and municipal retirement plans. STONE, *supra* note 57, at 4. In Europe, as well, next to the central social insurance system there are disability benefits arrangements for workers who historically have been well organized, including railroad employees, miners, farmers, civil servants, and more.

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One program was the program for the work-injured, a social insurance mechanism that was established by the National Insurance Law in 1954.<sup>72</sup> Work injury was based on progressive principles but was eventually designed to benefit a narrow group of persons with disabilities who were injured while at work or in circumstances related to work. A second mechanism was the Sa'ad system, a residual public assistance program that provided minimal relief for the poor who did not deserve National Insurance benefits, and that a large number of its beneficiaries were people with disabilities.<sup>73</sup> The Invalids Law, 1949,<sup>74</sup> represents a third program of disability benefits. It created a well-developed and generous system of services and financial assistance for the wounded of the 1948 war (the War of Independence), and in fact was the first state-provided benefits program enacted in Israel. These three programs created the foundations of Israeli disability policy for the years to come. Moreover, they have constituted the three spheres of disability policy: the soldiers, the workers, and the unemployed.

The multiplicity of welfare programs for people with disabilities calls first to acknowledge their contingency and second to examine the relationships among the various categories, their meanings, and consequences. Indeed, the claim that disability is a socially constructed category for the purposes of social welfare policies was well developed by Deborah Stone in her influential study on the origins of disability benefits. Stone traced the origins of the programs designed for people with disabilities in various countries to show the contingencies that underlay their formulation in contrast to the prevailing view that disability is a medical condition.<sup>75</sup> In this Article, I examine the relationships among the various legal categories that developed in Israel, what distinguishes them from each other, and how they constitute social hierarchies. My question is therefore not how the general category of disability was created but why a consistent, unified category of disability benefits is absent.

#### *A. National Insurance History: The Need for Disability Analysis*

The enactment of the National Insurance Law, which established the National Insurance Institute was a decisive moment in the history of

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72. See *supra* note 8.

73. See *infra* notes 112-114 and accompanying text, see also Section III.A.

74. Invalids (Pension and Rehabilitation) Law, 5709-1949, 3 LSI 119 (1949) [hereinafter Invalids Law, 1949]. During the next ten years the law was amended many times and in 1959 a consolidated version was published: Invalids (Pension and Rehabilitation) Law [Consolidated Version], 5719-1959, 13 LSI 315 (1958-59) [hereinafter Invalids Law, 1959].

75. STONE, *supra* note 57. While Stone acknowledges the plurality of programs she does not examine the different definitions employed by the various programs and deliberately avoids questions related to what views about disability those programs communicate or what place that people with disabilities occupy in society.

Israeli disability social welfare policy.<sup>76</sup> It was the first opportunity for the Israeli welfare system to address the needs of people with disabilities and to create a general mechanism of disability insurance. Yet that opportunity was missed. The content of the law reflected a compromise between the various political forces in early Israel. As Doron noted, “it was not . . . a rational solution to the problems of economic security of the population in Israel, but more of a reflection of the level of the social agreement that could have been reached in those circumstances.”<sup>77</sup> While early proposals encompassed unemployment, health, sickness, disability, work injury, maternity, child allowances, and old-age and survivors’ pensions, only four programs were eventually adopted: old-age, survivors, maternity, and work-injury insurance.<sup>78</sup> Additional programs were to be added in the future, but despite earlier proposals for a gradual expansion of the National Insurance Law, which was accompanied by a concrete timeline, no such plan was created.<sup>79</sup>

Despite its failure to fulfill its promise, the National Insurance Institute

76. Another possible point in time to study the roots of the welfare system is the pre-state era. During that time the pre-state Jewish community in Palestine established its own local mechanisms to address social welfare. As a result, three complementary welfare systems evolved to protect the workers from labor-related risks, to support the poor, and to provide direct services to various populations in need: the National Council (*HaVaad HaLe'umi*), the representative body of the pre-state Jewish community before the British regime, established a semi public-assistance program, funded by local voluntary taxes, donations from the Jewish Diaspora, and some budgetary support from the British regime; the *Histadrut* (General Federation of Labor), was the most influential institution as the largest and “official” labor union of the workers in Israel and an arm of the Zionist Labor Movement and it developed diverse welfare mechanisms that were exclusive to its members, *see infra* note 93; and finally, various voluntary associations, including old and new Jewish charities, women organizations, and Zionist philanthropist projects established private funds and charities to supplement what the public institutions did not accomplish. *See generally* JOSEPH NEIPRIS, SOCIAL WELFARE AND SOCIAL SERVICES IN ISRAEL: POLICIES, PROGRAMS, AND ISSUES 57 (1984) (Hebrew).

77. AVRAHAM DORON, THE STRUGGLE OVER NATIONAL INSURANCE 5 (1975) (Hebrew).

78. ABRAHAM DORON & RALPH M. KRAMER, THE WELFARE STATE IN ISRAEL: THE EVOLUTION OF SOCIAL SECURITY POLICY AND PRACTICE, 91 (1992) (Hebrew). The attempts to establish a central social insurance mechanism in Palestine started before statehood. As early as in 1945, the *Histadrut* advocated the need for a general social security system in a memorandum submitted to the Mandate regime (Memorandum submitted to the Director of Labour, 31 December 1945). In June 1948, right after the establishment of the state, it submitted a similar report to the new Israeli government (The plan was prepared by the Social Research Institute, an arm of the *Histadrut*, and was published in: Izaak Kanevsky, *A Social Security Program in the State of Israel*, 2 HIKREI AVODA 6 (1948)). Following that pressure, an interdepartmental committee was appointed in 1949 to prepare a general proposal for a comprehensive social security program. That proposal has laid the foundations for the National Insurance Institute and its recommendations were presented and published in 1950. INTERDEPARTMENTAL COMM. FOR THE PLANNING OF SOCIAL SECURITY, A SOCIAL SECURITY PROGRAM IN ISRAEL (1950) (Hebrew) [hereinafter INTERDEPARTMENTAL REPORT]. The program was to be implemented in three definitive stages and the report called “to extend the existing social security arrangements, gradually adapting, developing and expanding them into a social security system for the entire nation.” INTERDEPARTMENTAL REPORT, *supra*, at 23, translated in Raphael Roter & Nira Shamai, *Social Security and Income Maintenance Policy*, in ECONOMIC AND SOCIAL POLICY IN ISRAEL: THE FIRST GENERATION 241, 243 (Moshe Sanbar ed., 1984).

79. *See* DIVREI HAKNESSET [DK] (1952) 1213 (statement of Golda Meir, Minister of Labor, *Mapai* (Worker’s Party of Eretz-Yisrael)). The Interdepartmental Report did suggest a specific dateline. Although economic concerns led the committee to offer only a gradual program, by insisting on setting a timeline it exhibited a commitment to a universal and progressive social insurance system. *See* INTERDEPARTMENTAL REPORT, *supra* note 78, at 25-33.

was heralded as a triumph of the commitment to social welfare and an impressive achievement of a young state. It was particularly celebrated by the Israeli labor movement,<sup>80</sup> but also enjoyed wider support. From its early days, Israel has proudly declared itself a welfare state and established various social institutions to execute its social policies.<sup>81</sup> The National Insurance was a primary mechanism of that scheme. Izzak Kanevsky, a leading figure in the promotion of the social insurance initiative expressed that ethos when he wrote in 1942: “A superior mission is awaiting social security in the Land of Israel: to preserve the creative powers of the nation’s pioneers, who are building a homeland for persecuted people, in demanding conditions of sub-tropical climate, [in] a country filled with illnesses, and while transitioning to labor life.”<sup>82</sup>

That relatively favorable environment to social welfare can be attributed to four main factors. One is worldwide rise of social welfare programs that started in the late nineteenth century with the Bismarck laws in Germany and reached its peak with the publication of the Beveridge Report in England.<sup>83</sup> Thus, in the year 1951, at least forty-five states had some sort of social security program.<sup>84</sup> Second, Zionism’s generally supportive view of social welfare stemmed from its aspiration to transform the Jews as individuals and as a nation, and to establish a just society that would provide an example to all other nations.<sup>85</sup> In addition, strong

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80. See DK (1952) 1213; *id.* at 1254 (statement of Mordechai Namir, *Mapai*) (referring to the social enterprises of the *Histadrut* as a model of social justice). For a detailed review of labor Zionism and the various strands within it, see GIDEON SHIMONI, *THE ZIONIST IDEOLOGY* 166-235 (1995). Yet the nature of Zionist socialism and the extent to which the labor movement was truly committed to those ideals is a matter of heated debate among Israeli scholars, most notably among two of its leading historians, Ze’ev Sternhell and Anita Shapira. See ANITA SHAPIRA, *Sternhell’s Complaint*, in *NEW JEWS, OLD JEWS* (1997) (Hebrew); ZE’EV STERNHELL, *THE FOUNDING MYTHS OF ISRAEL: NATIONALISM, SOCIALISM, AND THE MAKING OF THE JEWISH STATE* 225 (1998).

81. One indication of the favorable environment for central social welfare mechanisms, is that within ten years of its founding in 1948, Israel had enacted several laws to execute its social policies. Several laws preceded the National Insurance Law, as some Knesset members noted with pride during the Knesset discussions over the proposed National Insurance Law. DK (1952) 1253 (statement of Mordechai Namir, *Mapai*), and 1293-94 (statement of Bebah Idelson, *Mapai*). These laws included the Compulsory Education Law, 5709-1949, 3 LSI 125 (1949); Annual Leave Law, 5711-1951, 5 LSI 155 (1950-51); Hours of Work and Rest Law, 5711-1951, 5 LSI 125 (1950-51); and Night Baking (Prohibition) Law, 5711-1951, 5 LSI 53 (1950-51). Clearly, each one of these laws deserves its own critique regarding the extent to which it met the expectation of a progressive inclusive policy.

82. IZAAK KANEVSKY, *SOCIAL INSURANCE IN THE LAND OF ISRAEL: ITS ACHIEVEMENTS AND PROBLEMS* (1942) (Hebrew).

83. INTER-DEPARTMENTAL COMM. ON SOC. INSUR. AND ALLIED SERVS., *SOCIAL INSURANCE AND ALLIED SERVICES REPORT BY SIR WILLIAM BEVERIDGE* (1942). For a historical review on the emergence and evolution of modern welfare policies, see DOUGLAS E. ASHFORD, *THE EMERGENCE OF THE WELFARE STATES* (1986); *THE EMERGENCE OF THE WELFARE STATE IN BRITAIN AND GERMANY, 1850-1950* (Wolfgang J. Mommsen ed., 1981); and *THE EVOLUTION OF SOCIAL INSURANCE, 1881-1981* (Peter A. Kohler & Hans F. Zacher eds., 1982). See also DORON & KRAMER, *supra* note 78, at 54-66; KANEVSKY, *supra* note 82, pt. 1 (1942); GIORA LOTAN, *TOWARDS A WELFARE STATE* 14-19 (1973) (Hebrew).

84. ZVI BAR-NIV, *NATIONAL INSURANCE ACT 11* (1958) (Hebrew).

85. The connection between welfare, social justice, and Zionism was particularly prevalent in the labor movement’s rhetoric as part of a general national-socialist worldview. But as *Divrei HaKnesset*

comprehensive social welfare mechanisms were supported by the idea of etatism (*Mamlachtiyut*) that was based on a vision of a strong centralized state that powerfully combined social justice with nation-building.<sup>86</sup> Finally, the general support of social welfare mechanisms by non-leftist parties was also attributed to their desire to undermine the hegemony of the labor movement and the influence it accomplished through its social enterprises.<sup>87</sup>

Why, then—despite these trends, so supportive of comprehensive social welfare programs—did the National Insurance Law abandon the idea of disability insurance? From its legislative history, it is clear that while some parts, such as health insurance and pension funds for the elderly, were compromised only after heated debates and long negotiations, disability insurance was denied without much deliberation.<sup>88</sup> Unfortunately, there is not yet a study providing a developed account of the concrete history of disability insurance and why the Law failed to provide it. In general, contemporary research on social insurance benefits in Israel is still overpowered by emphasis on economic factors and micro-politics.<sup>89</sup> As we shall see, though, these existing accounts are insufficient to explain the neglect of people with disabilities.<sup>90</sup>

(the records of the Israeli parliament) show, almost all Knesset members expressed a view of a social insurance law that painted it as an integral part of the Zionist project, and an important component in a social, political, or Jewish vision. See DK (1952) 1212-16, 1250-68, 1278-1313.

86. The faith in state involvement in the market and government responsibility for the needs of all its (Jewish) citizens collaborated with the aspiration to construct a united and unified Hebraic nation and resulted in a national effort to replace the scattered and highly divided socio-political structure of the pre-state Jewish community in Palestine with extensive state organs. The idea was advanced by David Ben-Gurion, the first Prime Minister of Israel and a prominent Zionist leader but with time became a national ideology. On etatism, see URI BEN ELIEZER, *THE EMERGENCE OF ISRAELI MILITARISM 1936-1956*, 280 (1995) (Hebrew); ILANA SILBER & ZEEV ROSENHEK, *THE HISTORICAL DEVELOPMENT OF THE ISRAELI THIRD SECTOR* 19 (2000); and Nir Kedar, *Ben-Gurion's Mamlakhtiyut: Etymological and Theoretical Roots*, 7 *ISR. STUD.* 177 (2002). On the structure of the pre-state Jewish community in Palestine, see DAN HOROWITZ & MOSHE LISSAK, *ORIGINS OF THE ISRAELI POLITY: PALESTINE UNDER THE MANDATE* (Charles Hoffman trans., 1978).

87. DORON, *supra* note 77, at 18. Non-leftist parties were caught in a paradoxical situation, as they understood that inclusive state-managed programs would reduce the labor movement's political power, but also allied with private-sector actors who opposed the proposal. The General Zionists' party, for instance, allied with the insurance companies against work injury insurance, but at the same time demanded governmental control over healthcare services. *Id.* at 45, 54-56.

88. DORON & KRAMER, *supra* note 78, at 62 (along with child allowances and sickness insurance).

89. These two prevalent explanations reflect the changing agenda of Israeli academia. URI RAM, *THE CHANGING AGENDA OF ISRAELI SOCIOLOGY: THEORY, IDEOLOGY, AND IDENTITY* (1995). During the first few decades of Israel's existence, academics were largely fascinated with the realization of the Zionist project and identified with the state. Thus the Sa'ad system was prevalently viewed as a better-than-nothing solution. See S.N. EISENSTADT, *ISRAELI SOCIETY* (1967); HOROWITZ & LISSAK, *supra* note 86. As the academia matured, a more critical view appeared which stressed interest-group politics and analyzed the dominant, ruling labor movement through the lens of elitism. Consequently, it yielded a micro-level political analysis that stressed major actors' choices and agendas. See *supra* Section II.A. This is the type of analysis employed by DORON & KRAMER, *supra* note 78. For an analysis from a perspective of elitism, see YONATHAN SHAPIRO, *DEMOCRACY IN ISRAEL* (1977) (Hebrew); and YONATHAN SHAPIRO, *AN ELITE WITHOUT SUCCESSORS: GENERATIONS OF POLITICAL LEADERS IN ISRAEL* (1984) (Hebrew).

90. Thus, Avraham Doron, a major scholar of the history of Israeli social insurance policy, has

The most prevalently cited reason to narrow the social security proposal was related to economic constraints. Due to massive immigration and the war from which it was still recovering, Israel faced poor economic conditions during its first years.<sup>91</sup> It has been argued that other countries too created a social security plan only in later stages of their development.<sup>92</sup> This view legitimizes the compromises in social welfare policy and displays the Sa'ad system as a better-than-nothing solution. Yet this kind of simplistic economic perspective is insufficient. It can only point to the general necessity to make hard choices, but cannot say why some options were considered or prioritized and others were not. The economic account neglects to explore, and sometimes even masks, the ideological, political, or cultural dimensions behind a selection decision.

The micro-politics account, for its part, refutes the assumption that social insurance policy in early Israel promoted a progressive and universal system of benefits and shows how the National Insurance proposal was also a terrain for political struggles, most interestingly among left-wing parties. This analysis, primarily advanced by Avraham Doron, shows that the fate of the National Insurance mostly depended on the position of the *Histadrut* (the General Federation of Labor), the major organ of the Zionist labor movement and the largest labor union in Palestine and later in Israel.<sup>93</sup> While during the pre-state era and immediately after statehood the *Histadrut* advocated the need for a general social insurance policy in Israel,<sup>94</sup> after the establishment of the state, becoming protective of its own power, it objected to the enactment of major branches of social insurance.<sup>95</sup>

The *Histadrut's* objections to state-run social insurance affected health and old-age insurance most strongly, since the *Histadrut* provided such coverage itself: indeed, they were the most successful achievements of the

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contributed greatly to a micro-politics analysis of other social welfare programs, but provides only one explanation for the early neglect of disability insurance: Israel's early atmosphere of poverty. DORON & KRAMER, *supra* note 78, at 62.

91. GHORA LOTAN, TEN YEARS OF NATIONAL INSURANCE: AN IDEA AND ITS REALIZATION 4, 8 (1964) (Hebrew); DORON, *supra* note 77, at 10-12; DORON & KRAMER, *supra* note 78; *see also* DK (1952) 1213 (statement of Golda Meir, Minister of Labor); *id.* at 1250 (statement of Ben-Zion Harel, General Zionists); *id.* at 1253-54 (statement of Mordechai Namir, *Mapai*); *id.* at 1284 (statement of Kalman Kahana, *Poalei Agudat Yisrael* (Workers of Agudath Israel)); *id.* at 1291 (statement of Yaakov Uri, *Mapai*).

92. LOTAN, *supra* note 83, at 4.

93. With time the *Histadrut* became the largest labor union and a powerful economic actor in Palestine and later in Israel. *See* LEV LUIS GRINBERG, THE *HISTADRUT* ABOVE ALL (1993) (Hebrew); THE *HISTADRUT*: FROM WORKERS' SOCIETY TO TRADE UNION (Yosef Gorny et al. eds., 2000) (Hebrew); ZEEV TZAHOR, ON THE ROAD TO *YISHUV* LEADERSHIP (1981) (Hebrew).

94. *See supra* note 78.

95. Debates among the political parties of the left at that time reveal that while *Mapai* (Worker's Party of Eretz-Yisrael), the ruling party both in the *Histadrut* and in government, generally promoted a general social security plan (with some reservations) as an idea that advanced the interest of the general public, it was accused by *Mapam*, its pro-Soviet rival, of destroying the *Histadrut's* power and autonomy, a claim to which *Mapai* was sensitive. DORON, *supra* note 77, at 13-19.

*Histadrut*, and its primary sources of income.<sup>96</sup> In the end, the National Insurance law did include an old-age program, but it was minimal and insufficient to provide a life of dignity to its beneficiaries.<sup>97</sup> In contrast, the work injury program became the flagship program of the National Insurance Institute—because the *Histadrut's* own work injury program had proved unprofitable and burdensome to the organization.<sup>98</sup>

In the context of disability insurance, however, the micro-politics explanation is even less convincing than the economic one. Unlike health and old-age insurance, the labor movement and the *Histadrut* had no special interest in a disability insurance program. Quite to the contrary, as the case of the work injury program reveals, the *Histadrut* had an interest in being relieved of having to supply workmen's compensation itself.<sup>99</sup> Disability insurance was therefore a program that the *Histadrut* was less interested in and that the labor movement in general saw as less worth fighting for.<sup>100</sup> The question is therefore why disability insurance was unworthy of a fight.

Despite its inability to explain why the lack of disability insurance elicited so little controversy, the micro-politics explanation is nevertheless a useful one as it exposes the role of power and interests in social welfare history. The above controversies reveal the multifaceted effect of the socialist legacy and the labor movement's complex relation to disadvantaged groups. Although social security was understood not as a charity mechanism but as part of a general agenda of social equality and state responsibility,<sup>101</sup> a socialist economy was believed to bring naturally an end to poverty and other social problems; therefore poverty was not an issue to tackle directly.<sup>102</sup> In that view, productivity was seen as a pre-condition for receiving welfare benefits, and physical labor as the way out of poverty and towards personal reform.<sup>103</sup>

Although social security was understood not as a charity mechanism but

96. *Id.* at 52. For a history of health insurance in Israel, see SHIFRA SHVARTS, KUPAT HOLIM THE *HISTADRUT*, AND THE GOVERNMENT: THE FORMATIVE YEARS OF THE HEALTH SYSTEM IN ISRAEL, 1947-1960 (1999) (Hebrew).

97. See DORON & KRAMER, *supra* note 78, chs. 6-7, for a detailed analysis of the elderly program, in which they claim that it was designed as a charity-like mechanism.

98. See *infra* note 214 and accompanying text.

99. *Id.*

100. Thus, the records of the Knesset proceedings show that only two Knesset members among all speakers brought up the issue of disability insurance and only one addressed the issue directly. See DK (1952) 1255 (statement of Mordechai Namir); *id.* at 1260-61 (statement of Eliezer Shostak, Herut Movement). Even *Maki*, the Israeli communist party, the only party that demanded the inclusion of a specific list of additional programs, including unemployment and various health benefits, neglected to address disability insurance. See *id.* at 1262-63 (statement of Esther Vilenska, Maki (Israel Communist Party)).

101. DORON & KRAMER, *supra* note 78, at 9.

102. *Id.*; Abraham Doron, *The Histadrut, Social Policy and Equality*, in THE *HISTADRUT* FROM WORKERS' SOCIETY TO TRADE UNION, *supra* note 93, at 693, 695.

103. Doron, *supra* note 102, at 695. I shall return to this point later. See *infra* Sections III.B-C.

as part of a general agenda of social equality and state responsibility,<sup>104</sup> a socialist economy was believed to bring naturally an end to poverty and other social problems; therefore poverty was not an issue to tackle directly.<sup>105</sup> Productivity, moreover, was seen as a pre-condition for receiving welfare benefits, and physical labor as the way out of poverty and towards personal reform.<sup>106</sup>

The micro-politics explanation also teaches us that the Israeli labor movement in general and the *Histadrut* in particular have promoted and eventually created a *selective* welfare system, which, unlike a universal system, furnishes services only to selected groups of persons—the workers, and primarily those workers who were affiliated politically with the labor movement and the *Histadrut*.<sup>107</sup> The protection of the *Histadrut* enterprises resulted in private welfare, which further contributed to the differentiation of services and benefits.<sup>108</sup>

Yet despite its contribution, the existing research has overlooked the socio-cultural environment within which those decisions were made with regard to people with disabilities and the visions about disability that guided those decisions. Even scholarship on disability benefits that noted the disparities among the various programs for people with disabilities neglected to do so. While it usually addressed the higher status of disabled veterans and work-injured, none have provided a contextual account for the roots of the low status afforded to the general population of people with disabilities.<sup>109</sup>

### *B. The Differentiated Structure of Disability Benefits*

The enactment of the National Insurance Law was a disappointment from a disability perspective. The opportunity to create a universal, inclusive, and egalitarian system was not taken, and instead, the contemporary foundations for the differentiated treatment towards people

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104. DORON & KRAMER, *supra* note 78, at 9.

105. *Id.*; Abraham Doron, *The Histadrut, Social Policy and Equality*, in *THE HISTADRUT FROM WORKERS' SOCIETY TO TRADE UNION*, *supra* note 93, at 693, 695.

106. Doron, *supra* note 102, at 695. I shall return to this point later. *See infra* Sections III.B-C.

107. Doron, *supra* note 102, at 700.

108. *Id.* at 702.

109. *See, e.g.*, ARIEL MILLER ET AL., *THE RIGHTS OF THE DISABLED IN ISRAEL: PROPOSALS FOR REFORM 12 (1979)* (Hebrew) (stating that their analysis is normative but only in terms of comparative analysis and suggestions for future reform, not in trying to provide an explanation to the roots of the discrepancies, but nevertheless addressing the higher status of IDF disabled veterans). John Gal's work stresses the national values that support the programs for disabled veterans and the work-injured but does not examine the roots of the inferiority of the rest of people with disabilities. *See* John Gal, *The Perils of Compensation in Social Welfare Policy: Disability Policy in Israel*, 75 *SOC. SERVICE REV.* 225 (2001) [hereinafter Gal, *The Perils of Compensation*]; John Gal, *Values, Categorical Benefits, and Categorical Legacies*, in *INTO THE PROMISED LAND: ISSUES FACING THE WELFARE STATE* 115, 131 (Asher Ben-Arieh & John Gal eds., 2001) [hereinafter Gal, *Categorical Benefits*]; John Gal & Michael Bar, *The Needed and the Nædy: The Policy Legacies of Benefits for Disabled War Veterans in Israel*, 29 *J. SOC. POL'Y* 577 (2000).

with disabilities in Israel were laid, and the marginality of people with disabilities was first fully exposed. The state's neglect of people with disabilities was not only in its lack of government allowances, but also in its lack of actual services. Although etatism aspired to replace the work of the voluntary associations that existed during the pre-state era, the new government did not assert a general commitment to the needs of people with disabilities, and no new social services were offered in any field related to people with disabilities, such as education, housing, or rehabilitation.<sup>110</sup> The services that did exist were part of the legacy of the pre-state Jewish community's enterprises, yet they were minimal and included only some services for blind persons and for those with developmental disabilities.<sup>111</sup>

Next to the National Insurance Institute was the Sa'ad system, the second major social welfare mechanism that the state created to respond to the needs of persons who could not enjoy National Insurance benefits. The Sa'ad was a residual assistance program for the general public that made a discretionary, case-by-case determination of benefits for applicants, which resulted in arbitrariness and incoherence.<sup>112</sup> The Sa'ad was founded based on an informal government policy and operated under no legislative framework until 1958.<sup>113</sup> However, the Sa'ad system was essentially the primary program for the majority of people in need, including primarily people with disabilities, and recent immigrants (*Olim*).<sup>114</sup>

The Sa'ad stands in stark contrast to all other ten disability benefits programs developed in the earlier years of Israeli statehood that were anchored in law and whose disability benefits went to small, discrete groups of people with disabilities.<sup>115</sup> The major among them was The Invalids Law, 1949, a third model of benefits, which unlike the work injury program that was based on a social insurance rationale, expressed principles of compensations and desert.<sup>116</sup> As I show later, due to its symbolism and high social esteem, it was not perceived as a welfare

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110. RALPH M. KRAMER, *THE VOLUNTARY SERVICE AGENCY IN ISRAEL* 11 (1976). The only enacted welfare law concerning services to people with disabilities during the first decade was the Mentally Sick Persons Law, 1955, 5715-1955, 9 LSI 132 (1954-1955), which regulated the operation of psychiatric institutions, but it concerned only the minimal duties of service providers towards those who already enjoy them and did not grant any direct rights to their beneficiaries, or potential beneficiaries.

111. Those services were provided by the Social Department of the National Council (*HaVaad HaLe'umi*), the selfgoverning body of the pre-state Jewish community. DORON & KRAMER, *supra* note 78, at 25.

112. For a detailed discussion on the Sa'ad system and its role in providing financial assistance to people with disabilities, see *infra* Section III.A.

113. Welfare Services Law, 5718-1958, 12 LSI 120 (1957-58). I shall call this law The Sa'ad Services Law, 1958, following its Hebrew name.

114. Elderly people were also among the main populations that the Sa'ad served due to the inadequacy of the old -age National Insurance program.

115. See *infra* notes 118-120 and accompanying text.

116. See *infra* Subsection IV.B.3.

program, but rather as a program of heroism and glory.<sup>117</sup>

These ten laws were particularistic legal arrangements for people whose disability was caused during or in connection to national causes or work. In addition to the work injury program and the Invalids Law for veterans of the 1948 war, the two major programs among them, they included benefits to state employees, police personnel, civilians injured in border-related encounters, survivors of the Holocaust, and more.<sup>118</sup> Compared to those programs, the Sa'ad, as we shall see presently, was the most inferior mechanism for welfare benefits. The result was that the majority of people with disabilities were subject to an incoherent system that was associated with a strong negative stigma, and that provided no economic security or sense of dignity.

The fragmentation of the field continued and by 1970 there were already seventeen disability-related laws, each constituting a distinct category of disability, mainly according to the circumstances in which the impairment was created, and each required different criteria for eligibility.<sup>119</sup> These programs largely followed the two primary models of work injury and disabled veterans, mostly depending on the value that was attached to their beneficiaries.<sup>120</sup> The result was a complicated, incoherent, and unsystematic web of statutes, regulations, and guidelines, which was developed with no clear vision of disability policy or prior planning.<sup>121</sup>

Lack of attention, lack of planning, lack of resources, and consequently lack of social security (both literally speaking and in terms of social

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117. See *infra* Section IV.B.

118. Civil Defense Law, 5711-1951, 5 LSI 72 (1950-51); National Service Law, 5713-1953, 7 LSI 137 (1952-53); Invalids (War Against the Nazis) Law, 5714-1954, 8 LSI 63 (1953-54); Defense Army of Israel (Permanent Service) (Benefits), 5714-1954, 8 L.S.I 149 (1953-54); Police (Invalids and Fallen) Law, 5715-1955, 9 LSI 80 (1954-55); Border Victims Law, 5717-1956, 11 LSI 19 (1956-57); Invalids (Nazi Persecution) Law, 5717-1957, 11 LSI 111 (1956-57); Fire-Fighting Services Law, 5719-1959, 13 LSI 215 (1958-59).

119. During the years 1959-1970 the following disability benefits programs were enacted into law: Prison Service (Invalids and Fallen), 5720-1960, 14 LSI 32 (1960); Life Saving Operations (Casualties) (Benefits) Law, 5725-1965, 19 LSI 314 (1964-65); Life-Saving Operations (Soldier Casualties) (Benefits) Law, 5725-1965, 19 LSI 314 (1964-65); Knesset Building and Precincts Law, 5728-1968, 22 LSI 226 (1967-68); Victims of Hostile Action (Pensions) Law, 5730-1970, 24 LSI 131 (1969-70).

120. For a detailed analysis of the differences between the various programs, see URIEL PROCACCIA & ARIE L. MILLER, *THE RIGHTS OF THE DISABLED IN ISRAEL: BASIC ISSUES* (1974) (Hebrew). For a table of the eighteen laws that existed in 1974 (including disability insurance), their diverse definitions of injury and the populations they cover, see *id.* at 32-33. In that book Procaccia and Miller provided the first (and unfortunately the last) comprehensive examination of the legal status of people with disabilities in Israel, but their research was aimed at showing the disparities and not exploring their roots. For a division of these laws between the two models, see *infra* notes 221 and 290 (the first details the laws that followed the work injury model, and the second those that followed the disabled veterans model). For a discussion of those models, see PROCACCIA & MILLER, *supra*, at 16-26 (discussing the different models of statutory definitions of "disability" and listing the laws that followed each definition), and 27-31 (discussing the different models of benefits).

121. MILLER ET AL., *supra* note 109, at 8-9. In this book the authors continued to the second stage of their research and presented a normative analysis of Israeli disability policy and its differentiated structure (the first part was PROCACCIA & MILLER, *supra* note 120).

welfare), are not just circumstantial. The Sa'ad's marginality and inferiority are indicative and in fact constitutive of the social status of its beneficiaries, among them people with disabilities. The constitution of people with disabilities as inferior through the Sa'ad system becomes more striking when compared to the other more privileged spheres of disability benefits.

### III. PRODUCTIVITY, ABLEISM, AND ORIENTALISM IN THE SA'AD SYSTEM

"The State of Israel is, first and foremost, a state of rescue and cure of masses of Jews, the cure of the body and the balancing of the soul. It is primarily about—the healthy Jew, the Jew who senses a solid ground and a meaning to his life, the Jew who is liberated from the fear of discontinuity, the Jew whose life is not so fragile anymore (*lo thuyim mineged*). And first thing first—balancing of the nerves of the nation . . . . The nation is still sick . . . . A progressive national insurance legislation is one path to create a mental balance on the way to cure the nation. We must carve a road in the national psyche to ensure and insure the individual on the foundations of pre-considered national savings. . . .

"To the extent that we will be able to teach the concept of national insurance to the masses of citizens of Israel, we will advance ourselves in the correction of the national psyche and in its building through cure, immunization, balance, and the nurturing of a productive and etatist feeling that elevates the production power of the person and the citizen of the state."<sup>122</sup>

#### A. *The Inferiority of the Sa'ad: Public Assistance for the Poor*

Despite the perceived priority of the National Insurance Institute, the Sa'ad system was in effect the primary welfare mechanisms in Israel until the 1970s. All persons that were not covered by the new National Insurance Law could turn to the Sa'ad (a word that means aid or assistance in Hebrew).<sup>123</sup> Unlike a social security system, and as a typical general public assistance program, the Sa'ad was designed as a last resort, a safety net for those who could not survive otherwise.<sup>124</sup> The following table summarizes the structural differences between the Sa'ad (public assistance) mechanism and a social insurance program:<sup>125</sup>

122. DK (1952) 1296-97 (statement of Haim Ben-Asher, *Mapai*).

123. The following review of the Sa'ad system is based on DORON & KRAMER, *supra* note 78, ch. 3; EISENSTADT, *supra* note 89, at 208-11. It is also based on PHILLIP KLEIN, PROPOSAL ON PROGRAM AND ADMINISTRATION OF THE MINISTRY OF SOCIAL SERVICE IN ISRAEL (1959), a report prepared for the government of Israel under the auspices of the United Nations Program of Technical Assistance; the report was not approved by the Government. For a shorter summary in Hebrew, see Phillip Klein, *The Sa'ad Service in Israel*, in WELFARE POLICY IN ISRAEL: A READER 69 (Avraham Doron et al. eds., 1969) (Hebrew).

124. DORON & KRAMER, *supra* note 78, at 21.

125. *Id.* at 65.

Sa'ad	Social Insurance
Means test, including relatives' liability	Firm right, not conditioned by income and income test, not linked to family liability
Benevolent giving, state-run charity	Civil right
Discretionary	Granted according to unified and equal rules
Stigmatizing	Social legitimacy
Deterring	Non-deterring
Selective	Universal
Conferred-upon allowance	Acquired right

The Sa'ad was not intended to allow a life of dignity and security, but a minimal relief that was essentially insufficient as it provided support that was lower than the minimum needed.<sup>126</sup> According to the "less eligibility principle" that was adopted, Sa'ad assistance was denied from a person even if his or her earned income was less than customary Sa'ad rates.<sup>127</sup> Moreover, although Sa'ad allowance had two components: a basic sum that is aimed at covering food costs and a supplemental amount for "additional expenses," these actual sums were very low. Thus, Sa'ad recipients received basic allowances that was worth between an eighth and a half of what a working family required, and a supplemental amount for "additional expenses" that was estimated as a third of their needs.<sup>128</sup>

Each applicant's eligibility for assistance was based on a means test, an individual assessment of neediness; consequently, broad discretion was conferred on the local welfare officers in granting financial support.<sup>129</sup> Having no guidelines or clear policy to direct the officers, and taking the role of caring for virtually all the new immigrants in a time of gross economic difficulties, the understaffed and underfinanced system almost collapsed.<sup>130</sup> The result was a lack of uniformity, arbitrariness, and

126. *Id.* at 24-26.

127. *See infra* notes 152-153 and accompanying text.

128. According to Israeli official statistics a low-class working-family of four persons in 1957 needed an average of 24 IL (Israeli Lira) per person per month (PPM) for food, and an amount of 33 IL PPM for additional expenses. Yet the Sa'ad basic allowances were around 3.20 to 12.75 IL PPM (compared to 24 IL), with an exception to special cases, which were not specified, of 15 IL PPM, and a special allowance to widows and elderly people of 18.3 and 27 IL PPM. The allowance for additional costs, if granted, did not exceed 10 IL PPM (compared to 33 IL). Other needs were covered in various ways, such as rent exemption by the municipal authority, medical care by the Ministry of Health upon recommendation, and clothes were supplied from donations from private resources. The example is based on data from the KLEIN, *supra* note 123, at 29-31.

129. DORON & KRAMER, *supra* note 78, at 21.

130. *Id.* at 21-22.

incoherence.<sup>131</sup> Additionally, the Sa'ad isolated and stigmatized its recipients as persons incapable of productive life and of a lesser value for society,<sup>132</sup> causing many people to avoid turning to the program for help.<sup>133</sup> In addition, the Sa'ad rules mandated that its recipients would be supervised by the social services.<sup>134</sup> This policy conveyed a message of personal failure that needed correcting and reformation, and it allowed intrusion into peoples' personal lives.

The fundamental reason for the Sa'ad's inferiority as a social welfare system was its inability to establish a citizen's right to receive it. It was instead designed as essentially a public "charity" program. Even after the enactment of the Sa'ad Services Law in 1958, which was supposed to provide more uniformity to the system, its basic flaws remained the same, as Rivka Bar-Yosef's critique expresses so strongly:

In principle and in practice, the particularistic system of the traditional charity was continued on the level of state bureaucracy . . . . In essence, this was the secular statement of the Jewish charity philosophy, which was reinforced by the case-study method of the professional social worker. But unlike the charity in the traditional Jewish community, public assistance was not an integral part of a total social conception: it did not assume a common value system or express norms of mutuality between givers and receivers.<sup>135</sup>

Other indications of the problems with the services the Sa'ad provided include the testimony about the poor physical conditions in the Sa'ad offices, the patronizing attitudes of social workers, and the outbursts of rage and sometimes even violence that occurred within the offices.<sup>136</sup> The financial assistance, which was insufficient to cover the needs of Sa'ad recipients, was also many times delayed, thereby causing hostility and anger. Moreover, the waiting rooms were usually too small, unpleasant and poorly maintained, and the Sa'ad officers sometimes responded by shutting the doors instead of listening to the complaints. In some places, doors of steel were in use, creating a prison-like atmosphere.

The very existence of such a program was important in itself, and indeed the role that the Sa'ad had in providing relief, as minimal as it might be, should not be overlooked. However, having a Sa'ad program

131. *Id.* at 22.

132. On Sa'ad's isolation and stigma effect, see *id.* at 24; and LOTAN, *supra* note 83, at 108. For an elaborated analysis of the role of productivity in shaping social attitudes towards persons who enjoyed Sa'ad benefits, see Sections III.B and III.C.

133. LOTAN, *supra* note 83, at 117.

134. DORON & KRAMER, *supra* note 78, at 24-25.

135. Rivka Bar-Yosef, *Welfare and Integration in Israel*, in *THE WELFARE STATE AND ITS AFTERMATH* 247, 255-56 (S.N. Eisenstadt & Ora Ahimeir eds., 1985).

136. The following is based on KLEIN, *supra* note 123, at 19; and M.A. Kurz, *Ten Years to the Sa'ad Services Law*, in *WELFARE POLICY IN ISRAEL: A READER*, *supra* note 123, at 117, 120 (explaining that the introduction of Appeal Committees within the Sa'ad have reduced the amount of violence in the Sa'ad chambers).

was not a high priority among Israel's early leadership. The labor movement leadership objected to the establishment of a Ministry of Sa'ad, claiming that it contradicted the socialistic goals of the new state, that it would perpetuate traditional approaches of charity and philanthropy, and that it did not offer a genuine answer to the difficulties faced by weaker groups in society.<sup>137</sup> But the history of the labor movement's involvement in the *Histadrut's* exclusive services to the workers, and later in the easy compromises during the enactment of the National Insurance Law, suggests that their commitment to those very groups was a weak one in the first place. The result was that the Sa'ad was left quite unnoticed, continuing the old policies of the formerly National Council's services, and employing the same personnel.<sup>138</sup> The Ministry of Sa'ad was put in the hands of small religious parties, and thus was doomed to be powerless and marginal with insufficient resources to fulfill the tasks it was supposed to execute.<sup>139</sup>

During the first decades of statehood the Sa'ad went through substantial changes, as a response to the pressing needs on the ground. These changes took two forms. The first were internal reforms towards formalization and efficiency, which included the enactment of the Sa'ad Services Law, 1958, and the issuance of internal guidelines. Both merely served to codify the existing Sa'ad's working practices.<sup>140</sup> The second type of change was more substantive, as additional National Insurance programs were enacted, reducing the number of Sa'ad beneficiaries. Such were the 1957 elders stipends (which were three times higher than Sa'ad), and the 1959 first child allowance program, which was gradually revised and expanded. But the major reforms took place only in the mid-1970s, with the 1973 unemployment insurance, the 1974 general disability insurance, the 1975 general child allowance program, and concluding with the Assurance of Income Law, 1980.<sup>141</sup>

Those changes were triggered by three main factors. Internally, the Sa'ad officials had worked to formalize and improve the efficiency of the service.<sup>142</sup> Internationally, a few reports written by United Nations officials criticized the state of welfare in Israel and especially the situation of the Sa'ad system.<sup>143</sup> And maybe most importantly, a national protest

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137. DORON & KRAMER, *supra* note 78, at 25; Doron, *supra* note 102, at 695.

138. DORON & KRAMER, *supra* note 78, at 25.

139. *Id.*

140. *Id.* at 27-28. The Sa'ad Services Law was criticized as lacking both a formulation of the individual's entitlement to benefits and a clarification of the government responsibilities in the operation of the law. Although the government did provide most of the funding it was not anchored as its duty by law. Kurz, *supra* note 136, at 118-19.

141. Assurance of Income Law, 5741-1980, 35 LSI 28 (1980-81). On the 1970s reforms, see DORON & KRAMER, *supra* note 78, at 15, 30.

142. For an insider's account of those efforts, see Kurz, *supra* note 136.

143. The primary among them is KLEIN, *supra* note 123.

movement, the local Black Panthers, brought the issue of poverty and ethnic divide to the forefront of the national agenda.<sup>144</sup> Although the Black Panthers' rage was mostly known for its ethnic tone, the effects of their protest reached far beyond Ashkenazi-Mizrahi relations as they pointed to the roots of poverty in Israel, and, as I claim below, were among the major triggers to the enactment of a disability insurance program in 1974.<sup>145</sup>

### *B. The Role of Productivity in Israeli Social Welfare History*

The notion of productivity is the best way to understand the assumed inferiority of the Sa'ad beneficiaries. Productivity was the underlying concern and the logic behind the assignment of people with disabilities to the Sa'ad. Yet in order to examine the role that productivity played with regard to people with disabilities, we must explore its roots and manifestations in other realms.

The roots of productivity in Israeli welfare policy can be traced in part to its role in Zionist thought.<sup>146</sup> For Zionism, productivity was a central value with a dual meaning of personal reform of the Jew from a "parasite" to a self-sufficient person through productive labor, and a collectivist project of nation-building.<sup>147</sup> Although influenced by socialist ideas, Zionism's version of productivity embraced all sectors that contributed to the project of productivization, including capital owners who invest in national enterprises.<sup>148</sup> The result was less commitment to the poorest classes, which had no access to labor and therefore were considered unproductive.<sup>149</sup>

The objections to the public assistance program during the pre-state era reflected this strain of Zionism, as did later opposition to the activities of the Sa'ad and any improvement in Sa'ad benefits. They were also present during the debates over an unemployment program.<sup>150</sup> The leading explicit fear was that any form of financial assistance would discourage people from work and would bring moral decay. This view was held by the *Histadrut* even when it established the Unemployment Fund for its own workers during the pre-state era. The Fund's resources were dedicated to

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144. See *infra* notes 172-173 and accompanying text.

145. *Id.*

146. On the productivization of the Jewish people, see BENJAMIN BEIT-HALLAHMI, ORIGINAL SINS: REFLECTIONS ON THE HISTORY OF ZIONISM AND ISRAEL 54 (1993); YEHUDA SLUTSKY, INTRODUCTION TO THE HISTORY OF THE ZIONIST MOVEMENT IN ISRAEL 37-39 (1973) (Hebrew); and Shira Schoenberg, The Haskalah, Jewish Virtual Library, <http://www.jewishvirtuallibrary.org/jsource/Judaism/Haskalah.html> (last visited Dec. 26, 2005).

147. ZE'EV STERNHELL, NATION BUILDING OR A NEW SOCIETY: ZIONIST LABOR MOVEMENT AND THE ORIGINS OF ISRAEL (1904-1940) 83 (1995) (Hebrew); Doron, *supra* note 102, at 695.

148. STERNHELL, *supra* note 147, at 8.

149. See *supra* note 103 and accompanying text on the *Histadrut's* complex relation to welfare programs.

150. For references to the relationships between productivity and labor movement resistance to assistance programs, see DORON & KRAMER, *supra* note 78, at 49-50, 120-29.

eradicating the problem of lack of work, and only in rare circumstances did it provide direct assistance to the unemployed. As Izaak Kanev, the head of the *Histadrut's* social insurance department and the primary advocate of social insurance during the transition era to statehood, put it: "Unemployment makes the person miserable; beyond taking the worker's source of living it affects him in a negative way. Accepting assistance for a long period of time brings with it physical and mental degeneration and destroys valuable labor-force."<sup>151</sup> Understood this way, the Fund's potential to function as a social insurance mechanism was evidently lost.

The same concern has shaped the Sa'ad system, as the following two complementary principles demonstrate. The first was the "less eligibility principle," which originated in nineteenth-century England and dictated that a person would not receive Sa'ad even if as full-time worker his or her income was less than the customary Sa'ad rates.<sup>152</sup> The second was the English "wage stoppage policy" that assured that a person who lived on Sa'ad should never be in a better economic position than those who work full-time.<sup>153</sup> Thus, requests for supplemental income were practically meaningless.<sup>154</sup>

When Israel was established, the proposed unemployment insurance program faced strong opposition and consequently failed. Instead, informal state-funded labor programs (*avodot dahak*) were created for the unemployed. Participants in these programs received wages for their work, but the wages were low and insufficient. The work was typically manual labor, consistent with the belief in physical labor as the way out of poverty and into integration in society.<sup>155</sup> Nevertheless, it was practically a Sa'ad program, a charity mechanism which provided only minimal relief and which stigmatized its participants who were considered dependent on the state and not worthy workers. Therefore people avoided it and preferred even lower-paying jobs.<sup>156</sup>

The concern with productivity was also evident during the enactment of the National Insurance Law, and it informed the debate in various ways. On the one hand, increasing productivity was a motivation behind the law, as the words of Golda Meir, the then-Minister of Labor, reveal:

Our country is facing now the tremendous tasks of production growth and productivity increase. . . . The fear of losing one's labor capability, the worry about deprivation or hunger, and the resentment for charity-taking (*matat chesed*) can all potentially damage the

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151. KANEVSKY, *supra* note 82, at 77.

152. DORON & KRAMER, *supra* note 78, at 31-32.

153. *Id.* at 47.

154. *Id.*

155. *Id.* at 124; LOTAN, *supra* note 91, at 110-11.

156. DORON & KRAMER, *supra* note 78, at 127.

efficiency and productivity of labor.<sup>157</sup>

On the other hand, some feared that the Law could lead to a decline in productivity. As one MK put it (calling the national insurance programs “Sa’ad”):

The question is whether this law would not increase the number of people living on Sa’ad. And whether it would not decrease the motivation to productive work, to productivity of labor, to professionalism and to the economic growth of the individual, who would delude himself to think that his future is in any way more or less secured with the enactment of this law.<sup>158</sup>

Furthermore, the priority was to help those who already worked. Thus, instead of a comprehensive supplemental income program, the government created special grants that were designed to help workers in need, such as bread allowances and other subsidies. The grants were a result of negotiation between the *Histadrut*, employers’ unions, and the government. They were received directly from one’s employer, who was later reimbursed by the National Insurance Institute.<sup>159</sup> Another example is the child allowances program, which passed only in 1965 and even then granted allowances only to the children of workers.<sup>160</sup> Similarly, even maternity insurance, which provided maternity leave benefits and passed without opposition, included only women who worked outside the home and left out women who were homemakers or unemployed.<sup>161</sup>

But underneath the ideological and economic concerns, which preferred employment to direct financial assistance, were negative attitudes and stereotypes toward those who were “unproductive.” These negative views fastened in particular on “Mizrahi” (“Oriental”) Jews—immigrants from Arab and Northern African countries. These immigrants were in general treated as primitive and uncivilized,<sup>162</sup> and in the context of labor they

157. DK (1952) 1284 (statement of Golda Meir, Minister of Labor); *see also id.* at 1267 (statement of Avraham Deutsch, *Agudat Yisrael*).

158. *Id.* at 1284 (statement of Kalman Kahana, *Agudat Yisrael*).

159. DORON & KRAMER, *supra* note 78, at 48.

160. National Insurance (Amendment No. 12) Law, 5725-1965, 19 LSI 215 (1965); *see also* DORON & KRAMER, *supra* note 78, at 103-06.

161. National Insurance Law § 3(b)-(c), 5714-1954, 8 LSI 4 (1953-54). The neglect of non-working mothers was widely criticized. *See, e.g.*, DK (1952) 1251 (statement of Ben-Zion Harel, *Zionim Klaliyim* (General Zionists)); *id.* at 1261 (statement of Moshe Kelmer, *Po’el Mizrahi* (Religious Zionist Movement Worker)); *id.* at 1283 (statement of Hannah Lamdan, *Mapam* (United Worker’s Party)).

162. *See* OZ ALMOG, *THE SABRA: A PROFILE*, 153-61 (1997) (Hebrew); MOSHE LISSAK, *THE MASS IMMIGRATION IN THE FIFTIES THE FAILURE OF THE MELTING POT POLICY* 58-62 (1999) (Hebrew); ELLA SHOCHAT, *ISRAELI CINEMA: EAST/WEST AND THE POLITICS OF REPRESENTATION*, Chapter 3 (1989); SAMMY SMOOHA, *ISRAEL: PLURALISM AND CONFLICT*, 86-95 (1978); Henriette Dahan-Kalev, *Feminism Between Mizrahiyut and Ashkenazyut*, in *SEX, GENDER, POLITICS: WOMEN IN ISRAEL* 217 (Dafna Izraeli et al. eds., 1999) (Hebrew); Ella Shohat, *Sepharadim in Israel: Zionism from the Standpoint of Its Jewish Victims*, Autumn 1988, *SOC. TEXT* 1 (1988).

were suspected as having a “different mentality,”<sup>163</sup> as lacking the motivation to work, and as being spoiled by the opportunity to receive cash assistance.<sup>164</sup> Thus, the *Histadrut* expressed the following position in 1957:

The vast majority of unemployed among us are *Olim* [new immigrants]. The very problem of including them within the labor circle, of introducing concepts of labor, and of technically accustoming them to manual labor, is the greatest revolution in our society, and a very deep and far-reaching individual revolution, in the heart, soul and body of each and every *Ole*. What is the reason in taking new *Olim*, most of whom have never worked, and tempting them with gifts of money, with cash assistance, until they will consider whether they should go to work, or whether they should find the lower income sufficient and live a life of unemployment. This is a very serious consideration.<sup>165</sup>

The Prime Minister, David Ben-Gurion, expressed similar concerns when he stated that “[t]ransforming this human dust (*avak adam*) into a cultured, independent nation with a vision—it is no simple task, and the difficulties are of no lesser magnitude than the difficulties of economic absorption.”<sup>166</sup>

These views were so popular and prevalent that only a foreign report could have exposed and critiqued them in a manner that would bring public turmoil and that would trigger change. In 1958, Professor Philip Klein, an American professor of social work, was appointed by the United Nations to conduct a thorough research of welfare policy in Israel for the Israeli government. The report revealed that the low level of support for persons living on Sa’ad was actually a result of intolerance towards “unproductive” sectors in society, arrogance towards recent immigrants and stereotypes about the poor, who were “deemed to be by nature lazy and shiftless.”<sup>167</sup> While some Knesset members expressed strong concerns, others questioned the data. Thus, one MK asked, “If the situation is so severe, how come people are not starving to death?” Klein bluntly answered, “Indeed, they do starve, but very slowly.”<sup>168</sup> Although

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163. KLEIN, *supra* note 123, at 15.

164. For various quotations on the subject, see DORON & KRAMER, *supra* note 78, at 125-26. Even S.N. Eisenstadt, the leading sociologist of Israeli society in its early decades expressed this concern, claiming that “the immigrants could be unwilling to work more than the necessary for the maintenance of their present level of needs, and would be especially unwilling to work to pay taxes.” EISENSTADT, *supra* note 89, at 130.

165. LISSAK, *supra* note 162, at 103; see also DORON & KRAMER, *supra* note 78, at 125.

166. David Ben-Gurion, State Yearbook, 25 (1951) (cited and translated in Nadav Davidovich & Shifra Shvarts, *Health and Hegemony: Preventive Medicine, Immigrants and the Israeli Melting Pot*, 9 *ISR. STUD.* 150, 153 (2004)).

167. KLEIN, *supra* note 123, at 15. On the impact of Phillip Klein’s report, see DORON & KRAMER, *supra* note 78, at 28-29.

168. DORON & KRAMER, *supra* note 78, at 29.

the Israeli government's pressure succeeded in preventing the publication of the official report, the report's influence was significant, as it triggered reforms in the Sa'ad system.

A serious move towards unemployment insurance happened in the second half of the 1960s, when the economy was down and unemployment became prevalent among all parts of Israeli society. In addition, new immigrants were coming from Western countries and no one believed in the need to redeem them through work. Even Yosef Almogi, the Minister of Labor at that time, who was critical toward the labor programs as "bad to the country and bad to those employed through them," was quoted saying that "the danger that new immigrants would prefer cash assistance over labor has passed" and that "the old type of *Aliyah*, with its unique human makeup, has ended."<sup>169</sup>

But the major changes in Sa'ad policy happened only in the third decade of Israeli statehood, which was characterized by intensive activity in the field of social policy.<sup>170</sup> These changes were a response to the "rediscovery of poverty" as Doron and Kramer put it,<sup>171</sup> following the protests and rage expressed by the Israeli Black Panthers movement. They protested against the growing inequality and the disparities in distribution of income, mobility opportunities, and political power between Ashkenazi and Mizrahi Jews in Israel, exposing strong feelings of alienation and resentment of many Mizrahi people against the Ashkenazi establishment.<sup>172</sup> The protests led to the appointment of public committees that recommended extensive reforms. Consequently, reforms were made to Sa'ad, including the enactment of a disability insurance program, unemployment insurance, and, finally, the Assurance of Income Law, 1980, which practically abolished the Sa'ad system.<sup>173</sup>

### C. *The Mutuality of Israeli Ableism and Orientalism*

Indeed, the significance of productivity always played an important role in the general history of disability benefits and welfare policy.<sup>174</sup> However, its role in Israeli disability history has not been fully exposed thus far, but rather concealed by the rhetoric of care for people with disabilities, under which high aspirations were thwarted by economic

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169. *Id.* at 130.

170. JOHN GAL, SOCIAL SECURITY IN ISRAEL 29-31 (2004) (Hebrew).

171. DORON & KRAMER, *supra* note 78, at 14.

172. *Id.*, at 14-16, 32-35; Shlomo Avineri, *Israel: Two Nations?*, in ISRAEL: SOCIAL STRUCTURE AND CHANGE 281 (Michael Curtis & Mordechai Chertoff eds., 1973); Celia S. Heller, *The Emerging Consciousness of the Ethnic Problem Among the Jews of Israel*, in ISRAEL: SOCIAL STRUCTURE AND CHANGE, *supra*, at 313.

173. And indeed, a comparison between poverty levels in the years 1968 and 1975 reveals that although the percentage of poor families, individuals, or children before getting allowances has hardly changed, the percentage of poor after receiving allowances did decline by thirty-six to forty percent. See S.N. EISENSTADT, THE TRANSFORMATION OF ISRAELI SOCIETY 228 tbl.9.6 (1985).

174. STONE, *supra* note 57.

necessities. This Section shows that the role that productivity played out in Israeli social welfare discourse also exposes the ableistic assumptions and practices that it employed.

The place of disability in the scheme of productivity was quite complex. On the one hand, it is clear that there was seemingly no place for people with disabilities in the Zionist world of worship for productivity and labor. “We should not allow in any way,” wrote the journalist Eliezer Livne in 1952, “a reverse or adverse selection, such that the healthy, the young, the skilled, and the well-off would remain in their communities of exile, and the retarded, backward, and uncivilized would be brought to Israel. That would be a complete distortion of Zionism.”<sup>175</sup> As Sander Gilman and Daniel Boyarin’s queer critiques of the politics of the body in Zionism reveal, Zionism adopted the negative stereotypes of the Jew’s body as impaired and damaged, and as physically and mentally ill.<sup>176</sup> The following words by A.D. Gordon, an influential Zionist thinker, provide a revealing example with regard to the ableistic undercurrents of Zionism and their relation to the Zionist project of productivization: “From now on, our primary ideal should be—labor. We have been impaired by labor . . . and by labor we shall be cured. . . . If we’d only realize the ideal of labor—we could be cured from the affliction we were contaminated with, we could heal our rapture from nature.”<sup>177</sup>

Healthism and ableism were inseparable parts of the Zionist project and people with disabilities were therefore destined to be outcasts in the Zionist imagery. People with disabilities were perceived as too sick, too deformed, too weak, and too dependent; in other words, they represented all that Zionism wanted to disconnect the new Hebraic Jews from.<sup>178</sup> The effort to cure the Jew from his “parasitic nature” and the belief in hard physical work as the ultimate answer for that “illness” were intolerant towards people who could not live up to that ideal and who were perceived ill and dependant themselves. Disability stood in total contradiction to the language and images employed by the Zionist vision. It was “a reminder of the Jew’s ‘crippled’ condition in pre-Israel times,” as Meira Weiss has argued.<sup>179</sup> The worthy bodies of the “new Jews” were

175. Eliezer Livne, *A Turning Point in Aliyah—A Turning Point in Economics*, BETEREM, May 15, 1952, at 5, quoted in LISSAK, *supra* note 162, at 64.

176. DANIEL BOYARIN, *UNHEROIC CONDUCT: THE RISE OF HETEROSEXUALITY AND THE INVENTION OF THE JEWISH MAN* (1997); SANDER GILMAN, *FREUD, RACE, AND GENDER* (1993).

177. Aharon David Gordon, *Labor (1911)*, in KITVE A.D. GORDON—*THE NATION AND LABOR* 132, 137 (Vol. 1, S.H. Bergman & L. Shohat eds., 1952) (Hebrew).

178. MEIRA WEISS, *THE CHOSEN BODY: THE POLITICS OF THE BODY IN ISRAELI SOCIETY* (2002); SAGIT MOR, *IMAGINING THE LAW: THE CONSTRUCTION OF DISABILITY IN THE DOMAINS OF RIGHTS AND WELFARE—THE CASE OF ISRAELI DISABILITY POLICY*, Chapter 2 (J.S.D Thesis submitted to NYU School of Law, 2005). For general materials on Zionist politics of the body, and the role of anti-Semite stereotypes in it, see ALMOG, *supra* note 162, at 127-53 (1997); and ANITA SHAPIRA, *The Myth of the New Jew*, in *NEW JEWS, OLD JEWS*, *supra* note 80, at 155.

179. WEISS, *supra* note 178, at 91.

so treasured and idolized for their physical and mental health that it seems that no room or vocabulary were left to include “deformed” or “imperfect” bodies.

On the other hand, unlike the Mizrahi immigrants, people with disabilities were not directly subjected to explicit stereotypes and social scrutiny. Although people with disabilities were not considered productive according to the parameters of Zionism and its ableist undercurrents, it is hard to find negative rhetoric about people with disabilities *per se* as unproductive, probably due to the prevalent assumption that a disability is not one’s fault. However, as the speech of Haim Ben-Asher, used as the epigraph to this Part, reveals,<sup>180</sup> the Zionist rhetoric of bringing physical and mental cure to the Jews as a nation and as individuals was still widespread. Thus, the ongoing negation of the exilic Jew as fundamentally sick and crippled, and the preoccupation with physical health and productivity, kept informing the cultural environment within which social policy and other decisions were made.

The link between disability and a lack of productivity becomes even more explicit when Israeli authorities and popular media discuss the actual and perceived prevalence of illnesses and disabilities among Mizrahi immigrants and their implications on Israeli immigration policy, thus revealing that the new immigrants were rejected not only as “primitive” but also as diseased and disabled. As one journalist complained:

This immigration has been allowed without screening people: a large place was given to all the ill-fated: frail elderly, chronically ill, handicapped, and other social cases. . . . The bringing of tens if not hundreds of people of an unfit type did not add powers to the state, did not benefit the *Yishuv* (the pre-state Jewish community in Palestine), did not bring a better hope for the future, and did not help the immigrants themselves, who in many cases became more miserable and bitter than they had ever been over there, among their neighbors.<sup>181</sup>

An editorial in *Ha’aretz* newspaper expressed a similar view:

Israel is ready and capable of continuing to absorb *Olim* who come to the country and are ready to undertake any effort of labor. . . . But Israel cannot keep absorbing *Olim* who need Sa’ad and are incapable of the construction effort. As a matter of fact, Israel will never be able to do so. It is not enough to prop up the fire of messianic enthusiasm. “Earthly Jerusalem” (*Jerusalem shel matah*) will be built only by working hands.<sup>182</sup>

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180. See *supra* note 122 and accompanying text.

181. Shmuel Osishkin, *On the Problems of Aliyah*, HABOKER, Nov. 16, 1951, at 3, quoted in LISSAK, *supra* note 162, at 60.

182. Editorial, *Crisis in Aliyah*, HA’ARETZ, June 29, 1953, at 2, quoted in LISSAK, *supra* note 162, at 60.

Yet an even more disturbing piece was published in *Davar*, the labor movement's newspaper, by Eliezer Livne:

We should not agree in any way that out of all people the part that is morally or physically backward (*mefager*) and dubious should be immigrating to Israel. It is not just a matter of material resources to support those immigrants . . . . The problem is not essentially financial, but rather social and spiritual. *Israel is not a refuge for the backward and unproductive circles of the Diaspora communities, but a center for their pioneers and the best among their sons.* Even if foreign elements would become involved to generously support all the 'social cases'—we should not accept these offerings for principled reasons.<sup>183</sup>

In his piece, Livne further questioned the motives for immigration of those “backward” immigrants, claiming that they cannot be compared to the old immigrants who arrived “out of tremendous yearning of the soul, heroic adventures, and without knowing what future holds for them.” In another place he concluded that allowing such immigration would be the complete distortion of Zionism.<sup>184</sup>

The data show that the mass of immigration indeed brought with it many people who were sick or disabled, but they were definitely not a majority among the immigrants. The number of Sa'ad recipients among the immigrants due to “limited work capability” was estimated at 111,000 out of 745,000 persons, which is about 15%.<sup>185</sup> Another estimate counted ten percent among the immigrants as living with chronic illnesses.<sup>186</sup> A special organization, *Malben*, was established in 1944 to take care of the immigrants who were sick, old, disabled, or needed significant help from social services.<sup>187</sup>

The number of people with special needs for extensive health care shocked the receiving Jewish community, which responded with panic. The Mizrahi immigrants were the main targets of that panic, partly because of additional stereotypes against them as “primitive” and “uncivilized.” Consequently, a medicalized discourse—and practices of screening, curing and inspecting the immigrants—became prevalent, which resulted in the treatment of the entire population of Mizrahi

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183. Eliezer Livne, *There Is No Aliyah Without Pioneers*, DAVAR, Nov. 9, 1951, at 2, quoted in LISSAK, *supra* note 162, at 64 (emphasis added).

184. See *supra* note 175.

185. LISSAK, *supra* note 162, at 43.

186. *Id.* at 42. Among those diseases were trachoma, tuberculosis, smallpox, polio, and malaria.

187. *Malben* was a typical pre-state organization, which was funded by private Jewish money but executed state-like missions. Even after the establishment of the state, it kept working and was praised for sharing the load of work with the general welfare services. *Malben* stands for *Mosad le-Tipul be-Olim Nechshalim* (the Institute for Treating Backward Immigrants). On its role in providing services to immigrants, see *id.* at 42-43.

immigrants with suspicion and paternalism.<sup>188</sup> To be clear, my purpose here is *not* to argue that the new immigrants were *not* in fact disabled or sick and therefore did not deserve such treatment, but rather to show the *pervasive use of the language of disability as an instrument for demeaning a population and rendering it useless.*

These attitudes were also reflected in the official immigration policy of the era. The restrictions on immigration were not only a result of the policy employed by the British regime,<sup>189</sup> but also a product of priorities made by the Zionist leadership.<sup>190</sup> A continuing issue in that respect was the weight given to political affiliation, as each Zionist strand was interested in bringing people that would support and advance its social and political vision. Thus, ever since the 1920s, the emphasis of labor Zionism on pioneering immigration has resulted in a preference for encouraging the immigration of unmarried people, and “courageous people who believe in idealism of the pioneering type, whom physical labor does not deter.”<sup>191</sup>

But only as the mass immigration of the 1950s arrived, a formal decision was made, exposing the ableism and healthism underlying Zionism’s practices. On November 18, 1951, the Jewish Agency, a central organ of the Zionist movement, which among other tasks administered and executed the Zionist immigration policy, issued selection criteria that should be used for screening among the immigrants.<sup>192</sup> According to these criteria, eighty percent of the immigrants should have been pioneering youth, skilled people of young age (under thirty-five), or families whose provider was under thirty-five. The remaining twenty percent who did not meet those criteria could immigrate only if they accompanied a family whose provider was capable of working, or if they had family in Israel who requested their arrival and were ready to support them. Still, all immigration certificates were granted only after comprehensive physical examinations. Although, at first glance, these criteria do not seem so different from the earlier policy, their ramifications were dreadful to these immigrants, who in general were older and whose population included more families than those who immigrated during the 1920s and 30s. As

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188. Davidovich & Shvarts, *supra* note 166. Davidovich and Shvarts focus on vaccination policy as a practice of power and a means of disciplining the body of the new immigrants.

189. See Moshe Lissak, *Immigration, Absorption and Society Building in the Jewish Community in Eretz-Israel (1918-1930)*, in 2 THE HISTORY OF THE JEWISH COMMUNITY IN ERETZ-ISRAEL SINCE 1882—THE PERIOD OF THE MANDATE: PART TWO 214 (Moshe Lissak chief ed., 1994) (Hebrew). The British Immigration Ordinance of 1933, for example, provided in section 5(1)(a) that “no foreigner . . . shall enter Palestine who is a lunatic, idiot or mentally deficient . . .” British Immigration Ordinance (Aug. 31, 1933), in 2 THE LAWS OF PALESTINE 745 (R.H. Drayton ed., rev. ed. 1934). According to the British immigration policy, Israel would be open to any Jew “mentally and physically healthy, that has guaranteed income and that would not present an economic or political risk to society.” Lissak, *supra*, at 216.

190. Lissak, *supra* note 189, at 219-34.

191. *Id.* at 220.

192. LISSAK, *supra* note 162, at 16.

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Lissak noted, “The immediate consequence of that decision was a separation of families; the old, the disabled, and those incapable of vocational training have remained in their countries of origin, while the young and the capable have immigrated to Israel.”<sup>193</sup>

These regulations were not applied to all groups of immigrants and did not last long. Excused from the screening policies were immigrants who were defined as “rescue immigrations” (*Aliyot Hatzalah*). Therefore the criteria did not apply to the survivors of the Holocaust from Eastern Europe and the immigrants from Yemen and Iraq.<sup>194</sup> But even with regard to other groups, the criteria were not always enforced due to the pressure of families who were not willing to break apart. The regulations were also criticized by opposing political parties. In 1953 they were amended to be less rigid, by elevating the age ceiling to forty and allowing disabled people to join their family if it had a provider who was capable of working.<sup>195</sup>

The experience of being rejected and subjected to constant scrutiny, of being portrayed as hopeless and useless, has left its marks on the immigrants who could not understand why they were treated this way. Lev Hakak, an immigrant from Iraq, says in his biography that he started fearing that he was truly *impaired*:

The fear—because *society has planted in me the feeling of impairment (Mum)*: a primitive man from a primitive origin, a son to an ethnic group that would succeed in nothing, . . . a man whose childhood was taken away with “dirty,” “morons,” “lost cause.” And if I didn’t excel, wouldn’t I justify what my foes and oppressors had sentenced me to?<sup>196</sup>

This powerful testimony conveys both the role of disability in the marking of the new immigrants as the “Other,” and the complex link between the experience of disability and the role of disabling social practices. The responses to the new immigrants exposed not only deep negative attitudes towards the poor, but also towards people with disabilities.

The complex link between ableism and orientalism that I expose here deserves more research.<sup>197</sup> However, I believe that it is already possible to argue that the mutual relationships between the “disablement” of the Mizrahi immigrants and the “orientalization” of people with disabilities have contributed to the marginalization of both groups and rendered them

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193. *Id.* at 20.

194. *Id.* at 18.

195. *Id.* at 20. Lissak claims that the real reason for loosening the criteria was the decline in number of immigrants.

196. LEV HAKAK, HA’ASUFIM 65 (1977) (Hebrew) (emphasis added), cited in LISSAK, *supra* note 162, at 75.

197. See EDWARD W. SAID, ORIENTALISM (1978).

even less productive and less worthy than they were perceived in isolation. Once this link is exposed it is also less surprising that the Black Panthers triggered the change in welfare policy towards people with disabilities. Both modes of exclusion were rooted in closely related socio-cultural assumptions.

*D. Between Deserving Poor and Undeserving Citizens*

As the study of the Sa'ad comes to conclusion it becomes clear that social welfare became a major field in which Israel's understanding of disability was constituted, as it institutionalized and legalized the hierarchy of power between disabled and able-bodied persons in society, and reinforced the prevailing views of disability as inferiority and of people with disabilities as non-productive members of society. The uninhibited language used with regard to people with disabilities and people who live with severe illnesses among Mizrahi immigrants is indicative of the deeply negative perception that people with disabilities were unproductive and unwanted members of society.

Moreover, Mizrahi immigrants and people with disabilities, who comprised the majority of poor people in Israel, were not two separate groups, but in fact, two groups with a vast overlap between them. They did not just inhabit similar socio-cultural spheres where assumptions were made regarding their non-productivity, but many of the people with disabilities, if not the majority among them, were new immigrants, and vice versa—a large amount of new immigrants who were Sa'ad recipients had disabilities. Thus, according to one report, people with disabilities comprised about fifty percent of all Sa'ad recipients.<sup>198</sup> At the same time, ninety-five percent of the families who were supported by the Sa'ad immigrated to Israel after 1949, and eighty percent of Sa'ad supported families came from Asian or African countries.<sup>199</sup> People with physical disabilities were also among the participants in the “corrective” “back to work” programs, which granted money for work and which aspired to transform the participants into productive citizens.<sup>200</sup>

Furthermore, if people with disabilities comprised fifty percent of Sa'ad beneficiaries, then all debates about Sa'ad had a clear and direct impact on them. It also suggests that policymakers must have realized the effects of their decisions on people with disabilities when considering Sa'ad-related issues. Nevertheless, people with disabilities did not receive higher levels of assistance, nor were they exempted from the power of the “less eligibility” principle or the “wage stoppage” policy.<sup>201</sup> Such an option was

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198. DORON & KRAMER, *supra* note 78, at 69.

199. EISENSTADT, *supra* note 89, at 210.

200. *Id.* at 126.

201. I am not suggesting here that such actions were the right ones to take, but pointing to the solutions that could have demonstrated a different view about people with disabilities.

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possible and even used to benefit civilians who were injured during the 1948 war, or later in attacks against Israeli civilians. Although they received their benefits from the Sa'ad administration and were still subjected to a case-by-case scrutiny, once a person was declared eligible, she would enjoy a special arrangement that entitled her to the same level of allowance as disabled veterans and to extensive medical treatment.<sup>202</sup> Alternatively, people with disabilities could have received higher levels of allowances, just like widows and elderly people, who starting from 1957 received special grants, though still insufficient.<sup>203</sup>

It seems that the understanding of disabled people in social welfare was of dual nature. On the one hand, disability was not yet established as a separate category in the local welfare discourse. People with disabilities seemed to be considered part of the general unemployed poor who should be carefully provided with enough support to survive, but not more than that. The orientalizing of people with disabilities has probably furthered the “invisibility” of disability, as people with disabilities belonged to the masses of “unfit immigrants.” As such they were a burden on the welfare system and an impediment to the realization of the Zionist project.

On the other hand, the spirit of the English Poor Laws, which were still influential at that time, depicted people with disabilities as the “deserving poor,” the poor that deserved assistance without being required to work.<sup>204</sup> In addition, traditional Jewish *Tzedaka* (charity) laws might have had their own influence in support of assisting needy persons.<sup>205</sup> Although it has been argued that Zionism in general aspired to distance itself from Jewish philanthropy as an exilic practice and therefore rejected charity-like services for the general poor,<sup>206</sup> it is probable that the attitudes towards people with disabilities, who are usually perceived not as responsible for their condition, were a little more forgiving. Thus, when the Sa'ad started to develop its own guidelines during the 1950s and 1960s, which codified its previous “unofficial,” and uneven practices, disability was acknowledged as a criterion for receiving public assistance. That change helped people with disabilities be eligible for Sa'ad benefits, but did not result in higher levels of assistance.

The paradox here is that people with disabilities were in a dual position of being noticed and unnoticed, pitied and abandoned, at the same time. They were the “deserving poor” on the one hand, but worthless citizens on the other. Hence, although early proposals for a social security system did

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202. Uri Yanay, *Assistance to Civilian Casualties of Hostile Actions*, 3 BITAHON SOTSIALI 137, 139-40 (1994) (Hebrew).

203. KLEIN, *supra* note 123.

204. *See supra* note 58 and accompanying text.

205. Translating *Tzedaka* as charity misses much of its unique meaning, which treats giving to the poor and the needy as a matter of justice and not good-hearted benevolence.

206. DORON & KRAMER, *supra* note 78, at 49-50.

include disability insurance among them, at the moment of truth, that proposal was quickly and easily discarded.<sup>207</sup> It was not until 1974 that a general disability insurance program was enacted which finally acknowledged people with disabilities as a separate category for social welfare benefits with specific needs and different circumstances.<sup>208</sup> For the first time, they were included in the National Insurance system and were expected to receive a higher and more dignified allowance. Nevertheless, that program still suffered from problems, which can be traced to the Sa'ad system, whose effects still shape today's challenges.<sup>209</sup>

The analysis thus far shows that social welfare became a major field in which Israel's understanding of disability was constituted, as it institutionalized and legalized the hierarchy of power between disabled and nondisabled persons in society, and reinforced the prevailing ableistic views of disability as inferiority and of people with disabilities as non-productive members of society. One way that law contributed to this scheme of power is by withdrawal. It first withdrew from accounting for disability insurance when the National Insurance Law was enacted, and then from granting a right to welfare to the beneficiaries of the Sa'ad system. Through that withdrawal it legitimized the informal practices of the Sa'ad and participated in the production of disability as a condition of inherent worthlessness to which the state expresses no accountability or any other form of social commitment. It would take a few more decades before the role of the state in disablement processes and therefore its accountability for people with disabilities would be fully exposed and articulated by the disability rights movement. The exposure of the structural barriers that people with disabilities face would allow the surfacing of more radical demands for symbolic recognition and social and political participation.

#### IV. THE PRIVILEGED SPHERES OF DISABILITY POLICY

"In a nation in arms and an army of labor, the desired bodies are those of soldiers and workers. People unfit for such national services are bound to be deemed marginal. And that is exactly the case in Israel."<sup>210</sup>

The neglect of the general population of people with disabilities is especially striking when compared to the situation of disabled veterans and the work-injured, the more prestigious groups of people with disabilities. These two groups achieved legal recognition in the first years after independence. The distinctive histories that stand behind those acts

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207. See *supra* notes 89-100.

208. National Insurance (Amendment No. 13) Law, 5733-1973, 27 LSI 233 (1972-73). See *infra* Part V for a discussion of the 1974 disability insurance program.

209. See *infra* notes 314-327 and accompanying text.

210. WEISS, *supra* note 178, at 88.

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of recognition shed light on the different social position that each group occupied, their different structure as groups, and the different understandings of disability in that era. This Part shows that a clear pyramid of benefits was created, with rigid boundaries between the various categories of people with disabilities. Each category was entirely different from the others, such that each inhabited a separate universe of material, social, and political conditions.

Contemporary research on disability benefits in Israel has indeed recognized and been concerned with the disparities among disabled veterans, the work-injured, and the general population of people with disabilities.<sup>211</sup> However, this research has overlooked the roots and reasons for those gaps, and more importantly, the *ableist meta-power structure* to which the entire scheme of disability policy is subject. Without acknowledging this power structure, the current criticism of welfare benefits is focused on the details and loses sight of the large picture; it misses the grand context in which all disability related policies are located.

This Part, then, attempts to remedy this deficiency. It shows that the inferiority of the general population of people with disabilities—the “truly disabled”—is constituted not only through direct practices but also indirectly through the legalization and institutionalization of the inner system of power that exists among the various groups of people with disabilities.

#### *A. Work Injury: A Civil Model for Disability Benefits*

Work injury is a disability category that enjoys a favored position in Israeli collective imagery and its welfare system. This favoritism was enacted into law relatively early, in 1954, as one of the first programs that the National Insurance Institute executed. Work injury was the first civilian-oriented program to address the needs of a group of people with disabilities. Yet during the debates over the National Insurance no links were drawn between a general disability insurance program and a work-injury program. The two have occupied separate categories in the Israeli understanding of disability. Although not free of struggle, the success of the program in overcoming obstacles is an additional indication of the favored position it enjoyed.

##### 1. A Flagship Program of National Insurance

Institutional history, global atmosphere, interests involved, and national values all provided favorable conditions for the enactment of work-injury insurance. From an ideological perspective, work-injury insurance was a

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211. See *supra* note 109.

paradigmatic program for the *Histadrut* to promote and for the state to adopt. It reflected the values in which labor Zionism believed and upon which the various Zionist strands could agree: labor, productivity, and nation-building.

Yet as the history of self-interest and value laden policies in the enactment of the National Insurance Law teaches, for a program to succeed in the legislative process, it was not enough to be “ideologically correct.” In this case, various factors came together to create the conditions for its success. First, even before World War II, work-injury insurance was already the leading internationally recognized welfare mechanism.<sup>212</sup> In Palestine, the Workmen’s Compensation Ordinance (1927) was among the very few welfare-oriented laws the British regime created.<sup>213</sup> The *Histadrut* also provided workers’ compensation to its members.<sup>214</sup> These programs acknowledged work injury as an emerging category of welfare policy that is worthy of compensation and reflected a clear preference for the disabled worker over disabled persons who did not participate in the labor market.

But most importantly, in the case of work injury, the *Histadrut* had an interest in the program because it was aware of the limited services it could provide to its members who became permanently disabled. The *Histadrut* was also concerned with its lack of resources. General social security insurance not only promoted labor’s agenda but also resolved a financial necessity.

Throughout the legislative process the commitment to the work-injured was high. The Interdepartmental Committee, which was appointed in 1949 to prepare a social insurance proposal, suggested a relatively generous and progressive scheme which was almost entirely adopted by the National Insurance Bill of 1951 and had an immense impact on the final shape of the National Insurance Law.<sup>215</sup> During the proceedings, the work-injury program enjoyed the strong support of the Minister of Labor and the Head of the Knesset Committee on Labor and received special attention as one that would bring a much-needed “radical reform” to the field.<sup>216</sup>

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212. BAR-NIV, *supra* note 84, ch. 7; John Gal, *Business and Social Policy: A Case Study of the Adoption of Workers’ Compensation in Israel* 4-5 (2004) (unpublished manuscript, on file with the author).

213. Workmen’s Compensation Ordinance (Jan. 16, 1927), in 2 THE LAWS OF PALESTINE, *supra* note 189, at 1550.

214. In 1929 the *Histadrut* established a Handicapped Fund (*Keren Nechut*). Its goals were to provide funds for continuing recovery expenses, long-term hospitalization, work placement and training, and to financially support institutions that were treating *Histadrut* members who became permanently disabled or chronically ill. In reality, however, the Fund’s resources were very limited. In addition, in most cases allowances were paid directly to providers, and only in rare cases were given directly to individuals. Moreover, the Fund typically provided support for twelve to eighteen months only. KANEVSKY, *supra* note 82, at 73, 112-13, 130.

215. Gal, *supra* note 212, at 18-22.

216. DK (1952) 1214 (statement of Golda Meir, Minister of Labor); *see also id.* at 1279-80 (statement of Reuven Shari, Head of the Committee on Labor); Gal, *supra* note 212, at 23.

The major source of opposition to the program came from private insurance companies, who dominated the market until then, but the commitment to the work-injured was strong enough to resist that opposition.<sup>217</sup> The impact of the proposed work-injury insurance could and actually did have an immense impact on that market. The proponents of the bill claimed that many workers did not get their due compensations, that rates of coverage were influenced by the negotiating power of each group of workers, and that lengthy litigation resulted in charity-like out-of-court arrangements instead of dignified and rights-based resolutions.<sup>218</sup> Overall, Roter and Shamai claim, the National Insurance Law “proposed a higher level of protection for employees which the insurance companies were unable to match.”<sup>219</sup> Working on a tort-like basis, the private insurance scheme lacked a social security orientation, which the National Insurance Institute was expected and intended to provide.<sup>220</sup>

Later on, the work injury program became a model that six additional statutes followed, though with variations. These statutes included mainly employment related categories, such as state, army and firefighting services employees.<sup>221</sup> Nevertheless, as the following section on disabled veterans shows, the groups who were powerful enough have struggled to escape the association with the National Insurance Institute and aspired to be associated with disabled veterans both for the benefits they received and the glory they enjoyed.<sup>222</sup>

## 2. Hollow Generosity

In general, it seems safe to say that the work injury program did not disappoint the high expectations that surrounded its enactment. It introduced a new approach to workers’ compensation that has survived to

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217. On the development of the workers’ compensation insurance market in Mandatory Palestine, the detrimental effect of the National Insurance Law on it, and the campaign of insurance companies, see Gal, *supra* note 212. Gal argues that the failure of the insurance companies’ campaign was not rooted solely in the hegemony of the labor movement, but was in lack of solidarity and coordination among the various business actors. *Id.* at 27-30. On the opposition of the insurance companies, see DORON, *supra* note 77, at 54-56; DORON & KRAMER, *supra* note 78, at 62-63; and LOTAN, *supra* note 91, at 10.

218. See DK (1952) 1279-1280 (statement of Reuven Sheri, the Head of the Knesset Committee on Labor).

219. Roter & Shamai, *supra* note 78, at 245.

220. *Id.*

221. The following is a full list of the laws that followed the work injury model (as compiled by PROCACCIA & MILLER, *supra* note 120, at 16): State Service (Benefits) Law [Consolidated Version], 5730-1970, 24 LSI 57 (1969-70); Defence Army of Israel (Permanent Service) (Benefits), 5714-1954, 8 LSI 149 (1953-54); Fire-Fighting Services Law, 5719-1959, 13 LSI 215 (1958-59); National Service Law, 5713-1953, 7 LSI 137 (1952-53); Border Victims Law, 5717-1956, 11 LSI 19 (1956-57); and Life Saving Operations (Casualties) (Benefits) Law, 5725-1965, 19 LSI 314 (1964-65). However, the structure of benefits and eligibility criteria for state employees and soldiers in permanent service were different in various aspects (Procaccia & Miller view them as a distinct category in their analysis).

222. See *infra* Subsection IV.B.5.

this day with very few amendments and no fundamental changes.<sup>223</sup>

The general provisions of the work-injury insurance included wide coverage for all salaried workers, including additional categories of people, such as members of cooperative associations, persons in vocational training or rehabilitation programs, members of first aid societies, and the self-employed.<sup>224</sup> That broad definition demonstrates a commitment to all productive members of society and not only to proletariat-like workers. But still, a close examination reveals that two main groups were left out. The most evident group is women who are homemakers, who were totally excluded from the law.<sup>225</sup> The second group was Arab-Palestinian workers, whose terms of employment did not conform with the law's definitions.<sup>226</sup>

The law provided two types of benefits to work-injured: in-kind and cash benefits. In term of cash benefits, the law granted a relatively generous level of compensation based on seventy-five percent of the previous earnings of the injured, multiplied by the degree of individual disability.<sup>227</sup> The calculation was based on a detailed table of impairments that determined the percentage of disability in every case.<sup>228</sup> As to in-kind benefits, those included medical treatment, medical rehabilitation and vocational training and rehabilitation.<sup>229</sup> The main pitfall in the in-kind benefits that were provided was the limited understanding of rehabilitation as connected to work only, and not as a broad category regarding all of life's activities. In contrast, benefits to IDF disabled veterans included a much vaster range of rehabilitation services already at that time.<sup>230</sup>

Yet the primary flaw of the program was its failure to cover injuries that occurred outside the workplace. According to the Law, work injury was defined as an accident or illness that occurs *while* the person is working, or *as a result* of his or her work (including accidents on the way to or back

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223. A simple comparison between the work injury program, as enacted in the original National Insurance Law, 1954, 5714-1954, 8 LSI 4 (1953-54), and its current version, *see* Chapter Five to the National Insurance (Consolidated Version) Law, 1995, S.H. 210 shows that the principles of the program have not changed throughout the years.

224. National Insurance Law, 1954, §§ 1 & 16(a).

225. Homemakers were left outside the entire National Insurance Law's provisions. *See* National Insurance Law, 1954, § 3(b)-(c).

226. Many Arab-Palestinian workers' employment conditions were different than those specified by the law either because they received actual harvest as their wage or because many of them did not enjoy a permanent job at all and were not organized to defend their rights and lobby before state agencies (I am referring here to Palestinians who were residents of Israel at that time, before 1967). DK (1952) 1292-93 (statement of Rostam Bastuni, *Mapam* (United Workers' Party)).

227. National Insurance Law, 1954, app. 4.

228. National Insurance (Determining Disability Level for Work Injured) Regulations, 5715-1956, K.T. 499 (1956).

229. Those services were subject to subsequent regulations to be issued by the Minister of Labor, and to guidelines to be issued by the responsible institutions. BAR-NIV, *supra* note 84, at 71-72.

230. *Id.* at 72. For a detailed critique of the rehabilitation system, see Victor Florian & Nira Dangoor, *Issues Related to the Rehabilitation System in Israel*, 19 HEVRA UREVAHA 193 (1999) (Hebrew).

from work).<sup>231</sup> The result was extensive litigation on the meaning of work injury in an attempt to establish the link between the injury and work, and to qualify for the law's generous compensation scheme.<sup>232</sup> Otherwise the person would find herself under the inadequate and stigmatizing Sa'ad system. From an insurance perspective, the problem here was that persons who had worked and paid their social insurance fees, and whose employers paid insurance on their behalf, were now deprived of benefits. The criticism is not only that it is undesirable to draw such a distinction, but also that it is impossible in a modern industrial society to isolate the causes and circumstances for each injury or illness.<sup>233</sup>

Finally, another problematic issue remained unresolved: The legislative arrangement did not include within it a section for cases of employer negligence. Therefore, employees would be required to privately litigate such claims at the civil torts system and in case of victory the employer would refund the National Insurance Institute for any amount paid to the worker.<sup>234</sup> That arrangement was clearly complicated and overburdening both for the individual litigant and for the system as a whole.

### 3. Gate-keeping Citizenship

The establishment of the new National Insurance Institute, then, created a clear hierarchy between the general population of people with disabilities and the work-injured. The differences were evident in every aspect of the distinct welfare mechanisms, starting with their place in the public ethos and imagery, and ending with the very content and details of the programs.<sup>235</sup>

Compared to other people with disabilities, who did not enjoy any program, the work-injured received comprehensive services and generous allowances. Other people with disabilities had to prove their neediness before the Sa'ad officer, subjecting themselves to his or her sole

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231. National Insurance Law, 1954, §§ 13 & 14(a).

232. LOTAN, *supra* note 91, at 107 (suggesting in 1964 that general accident insurance be created, a program that would not focus on work-related injuries); Bracha Ben-Zvi, *Overprotection Versus Discrimination in Legislation for the Disabled (the Work-Injured, the Generally Disabled)*, 43 BITAHONSOTSIALI 45, 48-49 (1995) (Hebrew).

233. Ben-Zvi, *supra* note 232, at 47-48 (discussing the complexities of work-related illnesses and their changing definitions); Arye L. Miller, *The Problem of the Class Differentiation of Disability Benefits: A Case for Going Beyond the No-Fault Principle*, 12 ISR. L. REV. 434, 441 (1977) ("Today, when endless technical innovations lead to an ever-increasing complexity in the structure of human living, it becomes more and more difficult to draw a line between risks of occupational and non-occupational origin." (quoting Tomio Higuchi, *The Special Treatment of Employment Injury in Social Security*, 102 INT'L LAB. REV. 109, 124 (1970))); *see also infra* notes 242-244 and accompanying text, for a more general argument regarding the role and responsibility of society and the state in creating and failing to prevent those risks.

234. Gal, *supra* note 212, at 25. Gal mentions there that it might have been a result of private negotiations between the *Histadrut's* insurance company (HaSneh) and the Ministry of Labor, so that the private market of work insurance would not collapse entirely. *Id.*

235. *See supra* note 125 and accompanying text for a table comparing the Sa'ad (public assistance) mechanism with a social insurance program.

discretion, and even then receiving only a minimal grant, which was far below dignified living. In contrast, the aim with the work-injured was to restore their previous ability to work through medical treatment and rehabilitation programs, and if that was impossible, to retain a standard of living that was close to the one that had been lost.

In terms of welfare policy, then, while the rationale behind the Sa'ad was merely *need*, the work-injury program combined two higher allocative principles of social welfare: *compensation* and *insurance*.<sup>236</sup> These three allocative principles—need, insurance, and compensation—guide any welfare system and help distinguish between the various mechanisms of distribution that each program employs. Each principle reflects a different value system, and shapes the type and level of benefits that a specific program offers.<sup>237</sup> Exploring those allocative principles therefore helps uncover the social hierarchies that underlie the seemingly technical and value-free welfare programs, which allow various groups to receive differentiated treatment.

The differences between Sa'ad and work injury insurance reflect the appreciation for the contributions of the work-injured to society.<sup>238</sup> The insurance principle “seeks to provide individuals with protection against income loss because of . . . pre-identified risks,” and to preserve the living standard of the insured,<sup>239</sup> while the compensation element reflects the social value that was attached to labor in Israeli society at that time.<sup>240</sup> As Gal claims, it is the compensation component that is problematic since it “inevitably leads to unjustifiable discrimination among people with similar needs and claims for social benefits.”<sup>241</sup> By contrast, an insurance rationale can lead to more egalitarian arrangements, especially if the element of modern risks is understood broadly.

An alternative and broader insurance rationale would have employed a more complex understanding of the nature of modern risks. It would have questioned not only the possibility of finding the responsible and establishing the link between the generator of the risk and the injured, but also challenge the availability of choice in avoiding those very risks. Therefore it was suggested that both the state and society have a role in creating and maintaining those risks and thus should be held accountable for them. According to this view, the interest of society and the state in

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236. Gal, *The Perils of Compensation*, *supra* note 109, at 235. In this article, Gal provides a detailed account of the relationships between these three allocative principles and the various welfare programs for people with disabilities in Israel. *See id.* The three principles were originally developed in NEIL GILBERT & HARRY SPECHT, *DIMENSIONS OF SOCIAL WELFARE POLICY* (6th ed. 2005).

237. Gal, *The Perils of Compensation*, *supra* note 109, at 225.

238. Miller, *supra* note 233, at 440.

239. Gal, *The Perils of Compensation*, *supra* note 109, at 231, 234-35; *see also* Florian & Dangoor, *supra* note 230, at 201.

240. Gal, *The Perils of Compensation*, *supra* note 109, at 235; *see also infra* Subsection IV.B.3 (regarding the role of the compensation principle in welfare benefits to disabled veterans).

241. Gal, *The Perils of Compensation*, *supra* note 109, at 227.

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technology and innovation requires state responsibility for the risks they entail and the possible harm they may inflict upon innocent people through accident and disease.<sup>242</sup> Since the purpose and function of the modern state is the proper organization of social life, the state is responsible for failing to manage modern life's risks.<sup>243</sup> Furthermore, as Miller, Procaccia and Kretzmer have maintained, one cannot really avoid those risks since they are present in any modern life activity, including using public facilities, such as roads and common spaces, or using consumer goods, such as electronics, medications, foods and drinks. Hence, since society imposes those risks on the individual, they concluded, it should also compensate for them through disability benefits.<sup>244</sup>

Yet those critiques do not go beyond the inner logic of social welfare and do not examine what role the programs play in the constitution of disability and what message they communicate about the meaning of disability. By narrowing the scope of National Insurance beneficiaries, the program was serving as the major gatekeeper of civil dignity. Drawing the boundaries of civil desert around restrictive circumstances of work-related injuries reinforced the view that the majority of people with disabilities are unworthy of dignified living. The extensive litigation surrounding the link between injury and work that this benefits scheme generated shows what was at stake for individual disabled workers and demonstrates the broader impact of the Law: a disability community divided between those who could prove the link and those who could not.

#### *B. Disabled Veterans: Heroism and Activism*

The program for IDF disabled veterans (*Nechei Zahal*) was far more generous than the benefits for the work-injured and enjoyed an even wider political and social consensus. The consequences were larger differences in benefits' methods and further inequalities. The differences between the programs vividly demonstrate the unique place that militarism and security occupy in Israeli society and the unique status that disabled veterans enjoy as a result. They also show the process of decline in the allure of the civil alternative.

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242. Miller, *supra* note 233. It is interesting to mention in this context that after the introduction of the general disability insurance program, two additional specific laws were enacted: Road Accidents Victims (Compensation) Law, 5735-1975, 29 LSI 311 (1974-75); and Defective Products (Liability) Law, 5740-1980, 34 LSI 92 (1979-80). These laws represented a concern regarding modern risks but they also demonstrate how narrow its understanding was.

243. Miller, *supra* note 233, at 441-42 (suggesting a universal "no-fault no-cause" scheme to address all accidents and injuries).

244. MILLER ET AL., *supra* note 109, at 46-47.

### 1. Legal and Institutional Setting

After the 1948 War, Israel exhibited a strong sense of commitment to the many soldiers and civilians who were injured (among its Jewish population). Its response to their needs was incredibly fast despite the aforementioned difficult organizational and budgetary conditions. Already during the first months of the war, the army created a program to meet the needs of the wounded soldiers.<sup>245</sup> A few months later, the Ministry of Defense took on that responsibility and provided employment and housing assistance, vocational training when needed, and a limited amount of cash allowances.

In 1949 the Knesset, enacted the Invalids (Benefits and Rehabilitation) Law, 1949.<sup>246</sup> The Invalids Law was among the first laws that the Knesset enacted, the first legislated social welfare program in Israel, and the first to create a state-run mechanism to address the needs of a specific group of people with disabilities. It provided generous non-means-tested benefits and comprehensive medical services, and authorized the Minister of defense to issue regulations on a variety of issues related to rehabilitation services, including occupational rehabilitation, business and home loans, and access to personal social welfare services and counseling.<sup>247</sup> In the years that followed, the Invalids Law was amended numerous times; the amendments aimed largely at liberalizing the law, expanding its coverage, and improving the benefit levels.<sup>248</sup>

Within a few years, in the mid-1950s, the Ministry of Defense established the Rehabilitation Department, which executed the Invalids Law's provisions by providing financial compensations for disabled veterans and the families of the fallen, setting up medical facilities for the injured, and facilitating their return to normal life, particularly to the labor market.<sup>249</sup> Unlike most other disability-based programs, the disabled veterans program remains under the authority of the Ministry of Defense, and the benefits it provides are part of the state security budget.<sup>250</sup>

Finally, the expenditure on disabled veterans' programs was remarkably high and demonstrated further the commitment to disabled veterans'

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245. The following history of compensation programs for disabled veterans is based on Gal & Bar, *supra* note 109. The civilians who were injured enjoyed a different type of benefits program. See *infra* notes 293-298 and accompanying text.

246. See *supra* note 74.

247. See Invalids Law, 1949, §§ 4-7 & 18, 5709-1949, 3 LSI 119 (1949) (concerning benefits levels); *id.* § 27 (concerning medical treatment); *id.* § 28 (concerning the authority to issue rehabilitation-related regulation); see also Gal & Bar, *supra* note 109, at 580-81.

248. Gal, *The Perils of Compensation*, *supra* note 109, at 234.

249. Gal & Bar, *supra* note 109, at 581.

250. See Invalids Law, 1949, §§ 23 & 29. A few attempts were made to change the administrative framework and transfer the responsibility for disabled veterans from the Ministry of Defense to the National Insurance Institute, but they failed at the very beginning. See, for example, the failed attempt of Pinhas Lavon as the Minister of Defense, as recounted in TRUE HEROES ZAHAL DISABLED VETERANS ORGANIZATION 1948-1998, at 75 (Yosef Lobenberg ed., 1998) (Hebrew) (hereinafter: TRUE HEROES).

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needs. In 1949-1950, the cost of the various rehabilitation services was nearly a tenth of Israel's national budget.<sup>251</sup> While other welfare programs have continually struggled with the limited resources argument, which was traditionally linked to the state's early developmental stage and pressing security needs, the expenses over disabled veterans were always considered a priority and part of the security and defense budget.<sup>252</sup> As I later show, these legislative and institutional separations significantly impacted Israeli disability policy and politics.

## 2. Heroism and Sacrifice

Admiration for the soldier-fighter as a heroic national figure, the role of self-defense and security as national values, the rise of militarism, and the centrality of the army in Israeli society, have all contributed to the deep commitment shared by the state and the public to the wounded soldiers who made the ultimate sacrifice for their country.<sup>253</sup>

One example for the image of IDF disabled veterans and the admiration to their sacrifice in Israeli popular culture in Israel's first decades is vividly pronounced in Yaron Ezrahi's childhood memories. In his book *Rubber Bullets*, which explores the changes in Israeli identity and ethos, he recalls:

My friends and I became very enthusiastic when we saw war veterans marching in the streets of Tel Aviv. Some of them were visibly wounded, while others appeared invincible. We admired them . . . . Still a boy, watching a military parade with my father one Independence Day, I asked myself whether my father would like me to be such a soldier.<sup>254</sup>

David Ben-Gurion, the first Prime Minister of Israel, expressed the collective commitment to IDF disabled veterans when he introduced the 1949 Invalids Law:

I am not aware of times in the history of our people, when there were peaks of heroism and glory as those exhibited in the lives and deaths of our young men . . . . The state has fulfilled its duty to all those who

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251. Gal & Bar, *supra* note 109, at 592.-

252. Still, as I show below, disabled veterans' activism had an important role in achieving those benefits and in shaping the policies' rationales and design. *See infra* Subsection IV.B.4.

253. On the turn from a defensive to offensive ethos in Zionism and the rise of militarism in Israeli society, see URI BEN ELIEZER, *THE EMERGENCE OF ISRAELI MILITARISM 1936-1956* (1995) (Hebrew); and ANITA SHAPIRA, *LAND AND POWER* (1992) (Hebrew).

254. YARON EZRAHI, *RUBBER BULLETS POWER AND CONSCIENCE IN MODERN ISRAEL* 152 (1997). The novel Ezrahi refers to is EDMONDO DE AMICIS, *IL CUORE* (1866). In the Hebrew translation the book was titled *The Heart*; in the English translation, *The Heart of a Boy*. The nineteenth century novel praises Italian heroism and national values. The father mentioned by Ezrahi warns his son that if some day in the battlefield he will "save his life" instead of "courageously fight," he will lose his father's love. Ezrahi reflects on how popular this book was among generations of young Israelis and the great effect it had on him personally. EZRAHI, *supra*, at 147-151.

were injured during the War of Independence. Of course, there are things that the state is unable to do: . . . it cannot return the lost limbs of the injured. Yet I believe that I do not exaggerate when I say that the state has made every possible effort to rectify and to rehabilitate what can be rehabilitated.<sup>255</sup>

After fifty years that rhetoric has remained the same. In 1998, when Israel celebrated its fiftieth anniversary, Ezer Weizman, the President of Israel and a legendary pilot, proudly declared that “the assistance to the disabled in his rehabilitation process is a supreme value in Israeli society.”<sup>256</sup>

That commitment did not stem solely from willingness to compensate for the pain that such an injury involves. Zionist politics of the body rejected the disabled body by explicitly aspiring to recreate the Jew as masculine, healthy, and powerful, and implicitly aspiring to redeem the Jewish body from the old anti-Semitic stereotypes to which it had been captive, stereotypes that had perceived it as imperfect and even deformed.<sup>257</sup> Thus, just as the naïve and romantic image of the worker was inaccessible to people with disabilities, so was the fierce, courageous, and heroic image of the soldier.

Consequently, because the disabled body was regarded as a deformed body, becoming disabled was perceived as becoming imperfect and even defective,<sup>258</sup> and in order to overcome that common perception, the bodies of disabled veterans was glorified as ones that carry the marks of war. That view was not only expressed by Prime Minister Ben-Gurion in presenting the Invalids Law before the Knesset.<sup>259</sup> Fifty years later, Israel’s top public figures expressed that same view, when Zahal (the word for IDF in Hebrew) Disabled Veterans Organization (ZDVO) celebrated its fiftieth anniversary. Opening the ZDVO’s jubilee album, President Weizman said: “The fifty years of statehood were characterized by war and ongoing struggle for the State’s independence and security. . . . In their daily rehabilitation efforts, *Nechei Zahal* [IDF disabled veterans] carry in their bodies and souls the traces of this struggle which unfortunately has not ended yet.”<sup>260</sup> Prime Minister Binyamin Netanyahu said: “Unfortunately, on our way to independence, . . . we have paid a precious price. . . . You, members of ZDVO, have a large share in this precious price. *You carry in your bodies and souls the marks of that*

255. DK (1949) 1576, translated in Gal, *Categorical Benefits*, *supra* note 109, at 131.

256. TRUEHEROES, *supra* note 250, at 2.

257. For materials that support this claim, see *supra* notes 176-179.

258. See *supra* notes 175-179 and accompanying text. For an elaborated critique of the relationships between militarism and Israeli body politics, see Meira Weiss, *The “Chosen Body”: A Semiotic Analysis of the Discourse of Israeli Militarism and Collective Identity*, 145 SEMIOTICA 151 (2003)

259. Ben-Gurion declared that it aimed to fulfill “part of the debt that we owe *those who with their bodies helped liberate the nation and the homeland.*” DK (1949) 1572 (emphasis added).

260. TRUEHEROES, *supra* note 250, at 2 (emphasis added).

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*persistent struggle of our people.*<sup>261</sup>

Furthermore, disabled veterans' contribution to society was praised in those passionate expressions of admiration as exceptional and unique; they were not portrayed as a burden on society, or as poor and miserable, but as still productive and valuable citizens. Thus, the Minister of Defense, Yitzhak Mordechai, has expressed before disabled veterans

a deep appreciation of your unique and fundamental contribution to Israel's security . . . and of the value of what you symbolize. . . . I am filled with appreciation for your capacity for persistence, your sternness, your heroism, and especially your contribution to Israeli society as a *unique and virtuous group*, despite facing injury and rehabilitation.<sup>262</sup>

And Shaul Mofaz, IDF Chief of Staff, said:

*In your daily struggle to maintain a normal life, we find the strength to continue with creation and innovation.* The education in values, as it is manifested in the dedication and devotion of each and every one of you, assures us that we have a society which is built on mutual aid . . . as we must have when military and society coalesce.<sup>263</sup>

Disabled veterans themselves have expressed this sense of pride and dignity as well. In 1949, an enraged veteran responded to a journalist's claim that disabled veterans take advantage of their disability to make a profit, and wrote:

I do not know whether you have ever considered the sanctity of the site on which you stand. If you did, you would not dare publish these repulsive words of hatred. . . . Attend to this! How much glory and heroism, fierceness and self-sacrifice [disabled veterans] have proven. Most importantly, how many rivers of blood and sweat, skin and nerves, flesh and bones, [they] have given away . . . . Thanks to [them] . . . who gave their lives, blood and limbs, . . . you and many like you are still alive.<sup>264</sup>

### 3. The Rationale: Compensation and Desert

In terms of welfare policy, the rationale behind the Invalids Law was compensatory. The disabled veterans' program was aimed at compensating "deserving" people with disabilities for whose loss or damage society takes responsibility.<sup>265</sup> Since in Israel military service is mandatory, the state's obligation towards its citizens is intensified, as it is perceived necessary for public and military morale and for the willingness

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261. *Id.* at 3 (emphasis added).

262. *Id.* at 4 (emphasis added).

263. *Id.* at 5 (emphasis added).

264. *Id.* at 17.

265. Gal, *The Perils of Compensation*, *supra* note 109, at 227; Gal & Bar, *supra* note 109, at 580.

of others to make that sacrifice.<sup>266</sup> That concern is echoed in a pamphlet published by the ZDVO in a 1987 campaign against the state's attempt to cut their benefits. The raging brochure contended:

We were not passively led to the war. We went to it knowing that upon our shoulders lies the sacred duty to defend the existence of the State of Israel, and knowing that if, God forbid, we should not return, or return disabled, the government of Israel will take care of our families and us.<sup>267</sup>

The compensation principle reflects a view of social justice that emphasizes the principle of "desert," which Gal critically described as dictating that "the truly needy will receive the essentials necessary to meet their basic needs, while society grants the deserving (however defined) a greater share of the common resources to meet theirs."<sup>268</sup> Yet desert, collides with equality, a competing principle, which dictates that individuals with similar needs receive similar resources. Hence, from the perspective of equality, a compensation-based system, as Gal concisely expressed, "inevitably leads to unjustifiable discrimination."<sup>269</sup>

The particularities of the disabled veterans program demonstrate how the compensation principle was translated into the concrete details of a very generous program. Although the law originally included a deduction mechanism if a disabled veteran had additional income (one that still guaranteed dignified level of income), this provision was soon gone.<sup>270</sup> Consequently access to benefits was unrestricted by material need or prior participation in an insurance program; and indeed, a disabled veteran's eligibility for benefits does not depend on his or her financial situation or work capacity, or on his contribution to social insurance.<sup>271</sup> In addition, the Invalids Law defines disability broadly, as it examines the recipient's capacity to undertake "regular activity," and is based solely on a medical test.<sup>272</sup> Although medicalized, this definition acknowledges a vast spectrum of disabling factors, relating to all life aspects, unlike the National Insurance Law's work-injury program, which defined disability based on ability to work.

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266. Florian & Dangoor, *supra* note 230, at 201. For a critique of that view, see MILLER ET AL., *supra* note 109, at 40-49.

267. TRUE HEROES *supra* note 250, at 113.

268. Gal, *The Perils of Compensation*, *supra* note 109, at 226; *see also* MILLER ET AL., *supra* note 109, at 41-43.

269. Gal, *The Perils of Compensation*, *supra* note 109, at 226-27.

270. Invalids Law, 1949, § 18, 5709-1949, 3 LSI 119 (1949) provided deductions based on additional income, yet it guaranteed that in any case the total income shall not be lower than the full allowance the person was originally entitled to plus additional sixty percent of a general basic allowance. The Invalids Law, 1959, 5719-1959, 13 LSI 315 (1958-59), no longer included that provision.

271. Invalids Law, 1949, §§ 4-7; *see also* Gal, *The Perils of Compensation*, *supra* note 109, at 234.

272. Invalids Law, 1949, §§ 1 & 10.

In addition, the basic level of compensation afforded by the law is relatively high and does not depend on actual previous income. Rather, the “basic wage” for calculating a disabled veteran’s stipend is linked to that of a medium-grade state employee.<sup>273</sup> That basic amount is equal among all recipients (depending on their level of disability), and it is supplemented by additional cash benefits for persons in need<sup>274</sup> or persons with an exceptional level of disability (above one hundred percent).<sup>275</sup> Finally, a compensation-based program typically emphasizes rehabilitation and reintegration into society.<sup>276</sup> Accordingly, disabled veterans enjoy comprehensive rehabilitation services that require the investment of large-scale resources, and include medical treatment, vocational training, placement services, assistance in housing solutions, and more.<sup>277</sup> Moreover, they are encouraged to engage in paid work and to increase their income with no negative effects on their basic benefit level; again an incentive system that is based on a willingness to pay benefits even to those who do not “need” them, and that allows disabled veterans to enjoy high living standards.<sup>278</sup>

The generous compensation program is a way for society to encourage and provide incentives to its members to keep serving in the army and to compensate those who were injured while serving. In reply, Miller, Procaccia and Kretzmer have showed that the scope of people covered by the program or that enjoy similar benefits does not demonstrate any consistency with this line of argument.<sup>279</sup> Thus, the compensation is the same whether the act is heroic or banal, and whether the injured was a soldier in a special unit or doing a clerical job and therefore does not necessarily encourage exposure to danger. At the same time, civilians who are injured as a result of a military-related activity, such as getting hit by a military vehicle, do not receive benefits. Moreover, disabled veterans’ benefits have been extended to other groups of people with disabilities, like police personnel and the Knesset’s guards.

From a disability perspective, an argument for veterans’ compensation that points to incentives toward military service misses the point, or worse,

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273. Invalids Law, 1949, §§ 1 & 5.

274. Invalids Law, 1959, §§ 6 & 7(a). The original Invalids Law, 1949, did not include additional allowances for persons in need but it was soon amended to include such supplements (§6A). For a detailed analysis of that provision, see PROCACCIA & MILLER, *supra* note 120, ch. 6.

275. Invalids Law, 1949, § 7.

276. Gal, *The Perils of Compensation*, *supra* note 109, at 230.

277. Invalids Law, 1949, §28, authorized the Minister of Defense to issue regulations concerning a wide range of issues relating to rehabilitation, including a general provision that allows regulations regarding “any issue . . . that might ease the integration of the disabled into the state’s economy and their settlement in it.” *See also* Invalids Law, 1959, §45.

278. Gal & Bar, *supra* note 109, at 583.

279. MILLER ET AL., *supra* note 109, 40-46 (discussing the various reasons to provide greater benefits to disabled veterans and the work-injured over the generally disabled).

contains insidious assumptions. For it fails to ask *whether people would (and should) avoid joining the army if they knew that any disabled person receives the same high level of benefits as a wounded soldier*. There is good reason that a person going into military service would expect excellent care in case of injury, but this expectation should not rest on the assumption that other disabled persons receive less.

Thus the real question remains: *What are the assumptions behind the compensation rationale that justify such an enormous gap between different groups of disabled persons?* I am not asking why the Invalids Law and related enactments gave so much to disabled veterans, but why Israel social welfare laws provided so little to the general population of people with disabilities. And most importantly, why do we assume that receiving the same means leveling the benefits downward and not upward?

The disparities, I suggest, serve not only to glorify the “deserving” and “needed” disabled veterans, but also at the same time to downgrade the rest of people with disabilities as “undeserving” and as “needy.” Underneath these benefits there is an assumption regarding the inferiority of disability and the need to compensate a person that was put by society into a disabling event. That event, I suggest, was a “crippling event” because it not only threatened to transform the person’s body, but also to alter his or her social position from a worthy to a worthless citizen. Within the Israeli disability discourse, then, disabled veterans were, and to a large extent still are, in a paradoxical position of being *the* handicapped of Israeli society but at the same time the *non-handicapped* of the disability community. Their disability was glorified for their superior sacrifice, but negated for its inherent inferiority.

#### 4. Activism and Group Consciousness

Disabled veterans in Israel have a high level of self-organization and group consciousness. The Invalids Law was the first to constitute a segment of people with disabilities as a distinct legal category. The Law also constituted disabled veterans as a distinct social group—not only because of the similar benefits they received, but also due to the relationships they developed in the course of their activism, and a new-found confidence in their entitlement, which motivated them to further action. While welfare researchers and policymakers largely consider the enactment of the Invalids Law to have been exceptionally quick in time and comprehensive in content, for the wounded of the 1948 War it was a result of a long process that involved uncertainty, despair, and activism.<sup>280</sup> The ZDVO was initiated during gatherings of wounded war veterans in the “Paraplegic Building” (*Bitan HaMeshutakim*) in Tel-HaShomer

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280. For an illuminating account of those early days and the formation of ZDVO, see TRUE HEROES *supra* note 250, at 12-18.

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Hospital.<sup>281</sup> These veterans sought to guarantee adequate assistance and proper rehabilitation policies and were very assertive in their struggle.

Representatives of the activists participated in the Knesset meetings over the drafting of the new Invalids Law. Rafi Kotzer, the leader of the wounded, recalls: "I was brought in a stretcher to the committee meetings. The stretcher was placed on four chairs, and by their side there was additional chair that served me as a desk."<sup>282</sup> Their demands were remarkably similar to the agenda of today's disability movement.

Our first demand was .... to guarantee that [the disabled ] would be able to *return to their natural environment*. The practice of the hospital and the Ministry of Defense was to take the disabled who completed treatment to one of the empty apartments in Jaffa and to give them an allowance. That was essentially the primary treatment for the most severely disabled. *We demanded employment, vocational training, or academic studies, in accordance with each one's ability and will.*

An additional important thing was employment. We demanded that a disabled person would be able to *work in a suitable place*, [and] that there will be enough suitable places, some of them sheltered and reserved first and foremost to disabled. *The stipends should be a supplement that will enable a disabled, despite his limitations, to be on equal par with a person who is not disabled.* Our last demand was to determine the Rehabilitation Department's *duty to consult with us* and to take into account the positions of the disabled.<sup>283</sup>

In that first struggle, the activists among the disabled veterans set the principles that guided the future activities of ZDVO and its relationships with the government. The veterans became advocates for themselves, who would have a say in designing policies that concerned them, who would be consulted in legislative and other policymaking process, and who would go to the streets if they were unsatisfied with those policies.

The participation and clear voice of disabled veterans themselves in the process has contributed not only to the basic notion that they should be rewarded and compensated; it has also influenced the goals and methods of the various programs. Throughout its history, the ZDVO has insisted on reintegration into mainstream society, on the return of each one to his or her original neighborhood, on finding a suitable job and receiving a stipend that allows disabled veterans to close the gaps between themselves and the non-disabled. In contrast, the general population of people with disabilities started fighting for these benefits and principles only four to

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281. *Id.* at 14-16.

282. *Id.* at 17.

283. *Id.* at 17 (emphasis added).

five decades later. Disabled veterans, then, enjoyed not only receptive social and cultural conditions, but also an inner belief in their “desert.”

The ZDVO achieved the veterans’ goals in two main ways: first, through consultation practices and political lobbying, and second, by becoming a service supplier itself. ZDVO’s use of political power was unique in the organizational landscape of voluntary associations in 1950s-60s Israel, and throughout the years it has developed substantial bargaining capacities.<sup>284</sup> Thus, it succeeded in establishing long-term relationships with the Ministry of Defense through formalized annual negotiations over the state of benefits for disabled veterans,<sup>285</sup> and it was able to pass progressive legislation over the Ministry of Defense’s opposition thanks to wide support from Knesset members and the general public.<sup>286</sup> When their demands were not met, or when implementation required further struggle, disabled veterans went out to the streets on strikes and campaigns to make their demands visible, confident that their plight was a matter of public concern.<sup>287</sup>

As a service supplier, ZDVO has gradually created its own supplemental social services programs in various fields, including education, vocational training, counseling and work placement, and even direct financial aid.<sup>288</sup> On its website, ZDVO explains:

Supporting the disabled veterans during the process of rehabilitation is the highest priority in Israeli society. The State of Israel . . . contributes to the coverage of medical care, compensation, and housing. However, a complete physical, mental and social rehabilitation that is necessary for the success of this lengthy process is beyond their [sic] capabilities.<sup>289</sup>

The ZDVO supplied additional services in the field of social and recreational activities, including the establishment of The Fighter’s Home (*Beit Halochem*), a club-like sports complex and gathering place for disabled veterans in various major cities around Israel. The political,

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284. KRAMER, *supra* note 110, at 59-69.

285. Gal, *The Perils of Compensation*, *supra* note 109, at 234.

286. KRAMER, *supra* note 110, at 60. According to Kotzer, even in 1949, in those first meetings in the Knesset, the parliament members were sensitive and open to the demands of the veterans, and preferred their positions over those of government officials.

287. The following are examples of various campaigns and strikes during the 1950s, mostly organized by the ZDVO, as reported in TRUE HEROES *supra* note 250. In 1950 four veterans opened a hunger strike demanding certain rehabilitation services. *Id.* at 18. In a 1951 sit-in strike, six veterans protested against delays in granting taxi licenses. *Id.* at 20. In 1952, more than 400 ZDVO members blocked the entrance to the Ministry of Treasury which objected to some amendments to the Invalids Law that were initiated by the organization. *Id.* at 23. In 1953, members of ZDVO opened a sit-in strike against protesting against rehabilitation policies which they viewed as inefficient and ineffective. *Id.* at 24. In 1958, ZDVO’s picket lines demonstrated against Gat Cinemas in Tel Aviv for not taking disabled veterans as ushers, despite the legal obligation to do so; consequently, Gat agreed to take two of the three veterans who applied for the job. *Id.* at 36.

288. KRAMER, *supra* note 110, at 85.

289. ZDVO, The Veterans Fund, <http://zdvo.org/eng/theveteransfund.asp> (last visited Dec. 26, 2005).

organizational, and economic strength of ZDVO are indicative, therefore, not only of the social esteem that IDF disabled veterans enjoy in Israeli society but also of the sense of desert and self-esteem that they manifest collectively. They are also striking in their stark contrast to the lack of solidarity among the general population of people with disabilities during that time.

##### 5. A Model To Follow

Because of the generous benefits and the social prestige that disabled veterans enjoy, many other groups have struggled to achieve similar benefits and to share the glory. These were mainly groups perceived as related to national missions, either because of the position of their members, such as police and civil guard (*Mishmar Ezrahi*) personnel, or because of the circumstances of injury, such as people who were injured during “hostile actions,” or survivors of the Holocaust.<sup>290</sup>

The material stakes in these struggles were tremendous, especially for people with a very low prior income or no income at all. For these people, stipends were calculated based on a minimal or low income, and were far lower than what was received by a similarly situated soldier who was injured during military service. Thus, in order to achieve better benefits and to receive higher social recognition, some groups have struggled to get closer to the disabled veterans model and to distance themselves from the work injury model by evoking national values.<sup>291</sup>

Two illuminating struggles in this context concern the benefits for veterans of World War II and civilians injured by “hostile actions.” In 1952, the government proposed a draft program for the veterans of World War II that would be administered by the Ministry of Labor (the National Insurance Institute was not yet established).<sup>292</sup> Yet that program encountered a strong lobby of veterans’ organizations and Knesset members who called to equalize the status of all disabled veterans. In the end, although the benefits were not identical, the structure of the programs was similar. Yet one of the striking changes to the law was the transferring of the program from the Ministry of Labor to the Ministry of Defense, a change which was accepted by the veterans of World War II as a signal

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290. The following is a list of laws that followed the disabled veterans’ model: Invalids (War Against the Nazis) Law, 5714-1954, 8 LSI 63 (1953-54); Invalids (Nazi Persecution) Law, 5717-1957, 11 LSI 111 (1956-57); Police (Invalids and Fallen) Law, 5715-1955, 9 LSI 80 (1954-55); Prison Service (Invalids and Fallen), 5720-1960, 14 LSI 32 (1960); Knesset Building and Precincts Law, 5728-1968, 22 LSI 226 (1967-68); Security Service Law [Consolidated Version], 5719-1959; Civil Defense Law, 5711-1951, 5 LSI 72 (1950-51); Victims of Hostile Action (Pensions) Law, 5730-1970, 24 LSI 131 (1969-70); and Life-Saving Operations (Soldier Casualties) (Benefits) Law, 5725-1965, 19 LSI 314 (1964-65).

291. Gal, *Categorical Benefits*, *supra* note 109, at 128-34; Gal & Bar, *supra* note 109.

292. The following is based on Gal, *Categorical Benefits*, *supra* note 109, at 129. For an explanation of “hostile actions,” see *infra* note 351 and accompanying text.

that their status in society was at least formally equal to that of IDF disabled veterans.

The second and more telling example was the struggle over the compensation of victims of hostile actions, namely civilians who were injured in enemy attacks.<sup>293</sup> The compensation for those civilians was always under the care of the Israeli government, but its administration and legal basis have changed with the circumstance and nature of those actions. Interestingly, an early program from 1956 (Border Victims Law, 1956) was celebrated for being modeled after the work-injury program. But in 1969, when the issue was brought again before the Knesset through the Victims of Hostile Action (Pensions) Law, 1970, the lobby for the victims successfully changed the law so that its beneficiaries would enjoy benefits similar to, and updated with, those of disabled veterans.

The lobby argued that the gap between the benefits for disabled veterans and for victims of hostile actions, if remained similar to work-injured, is too broad<sup>294</sup> and that “there is a moral aspect and social justice” involved in the equalization of their entitlements, as it “prevents injustice to low-income people and [it] bases allowances on the equal right of each victim regardless of his income.”<sup>295</sup> The struggle, however, failed to transfer the program to the Ministry of Defense.<sup>296</sup>

Interestingly, during the enactment of the Compensation for Victims of Hostile Actions Law in 1970, MK Yehudah Shaari asked: “Isn’t it the time to develop general disability insurance? . . . [T]hen we would be able to simplify all proceedings and to cover all risks including those that are not yet covered?”<sup>297</sup> As it is clear by now, such a question challenged the deep structure of disability policy and contradicted its basic assumptions. It is not surprising, then, that Sha’ari’s challenge was ignored. As Yanay has noted, there was a clear intention among the MKs to distinguish between the victims of hostile actions and other people with disabilities.<sup>298</sup>

The above struggles demonstrate that these groups not only wanted the material support that disabled veterans receive, but also sought a similar symbolic capital and social status, a recognition that their injury was a valued one, and that they were deserving citizens.<sup>299</sup> In both cases, these welfare programs were initially placed under the auspices of the National Insurance Institute, with a benefit structure different from that created for

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293. The following is based on Yanay, *supra* note 202; and Gal, *Categorical Benefits*, *supra* note 109, at 129.

294. DK (1969) 285 (statement of Uzi Feinerman, *HaMa’arach* (Alignment)).

295. DK (1970) 2613 (statement of Shoshana Arbeli Almozneno, Chair of the Knesset Labor Committee (*HaMa’arach*)).

296. On the exchange before the Knesset Labor Committee between the representatives of the NII and the Ministry of Defense see Yanay, *supra* note 293, at 47.

297. DK (1969) 286 (statement of Yehudah Shaari, Independent Liberals).

298. Yanay, *supra* note 202, at 44.

299. See Gal, *Categorical Benefits*, *supra* note 109; Yanay, *supra* note 202, at 44.

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disabled veterans. And in both cases an effective lobby work managed to link their benefits and those of disabled veterans, claiming that they should have received similar recognition and enjoyed better benefits than other people with disabilities.

Consequently, the disabled veterans' compensation program, and sometimes disabled veterans themselves, served both as an inspirational model and as a dividing force in disability policy and within the disability community. Their achievements are celebrated but the effects of those accomplishments are problematic; their agency and activism are exceptional, but the social conditions and cultural resources that gave rise to this sense of entitlement could not be shared by all disabled people. And finally, while disabled veterans created close affinities among themselves, they did not develop solidarity with the general community of people with disabilities.

### *C. Escaping Disability: The Invalids Law's Impact on Disability Policy Dynamics*

The result of the dynamics discussed above was that all social and political actors maintained an ideological and institutional separation among the various groups of people with disabilities. The effect of that separation, I suggest, is best understood in light of the meta-power structure in which all those programs were situated. An emphasis on the meta-power structure also reveals the role of the Invalids Law in the continuing exclusion and marginalization of people with disabilities.

First, the differences among the various programs' benefits structures are illuminating, and basically remain today, in 2006, the same as they were in the 1950s.<sup>300</sup> Thus, a disabled veteran allowance was calculated based on a medium grade state employee, a sum which represented a respectable market salary (and which was supplemented by an additional allowance if needed); a work-injured allowance was calculated based on seventy-five percent of the person's previous income; yet a potential disabled Sa'ad recipient (today a disability insurance beneficiary<sup>301</sup>) could only hope to be eligible for a sum which was insufficient to provide for his or her basic needs.

Yet the most striking difference in that regard was the concern about productivity and the incentive to work. Because it was feared that Sa'ad recipients would prefer Sa'ad to work, they received less than the lowest income in the market, and lost that allowance once they were even

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300. Gal, *The Perils of Compensation*, *supra* note 109 (providing an analysis of the disparities among the programs in 2001).

301. On the introduction of a disability insurance programs and its critique, see *infra* text to notes 315-322 and accompanying text ,

partially employed.<sup>302</sup> But with regard to disabled veterans, the logic was the complete opposite: They never lost their basic allowance, no matter how high their salary might have been, and their willingness to work was never questioned.<sup>303</sup> Disabled veterans, then, were never required to prove their productivity while for the majority of people with disabilities the assumption was lack of productivity. The message was clear. For civilians, work and labor are the way to establish one's citizenship: regain your productivity by restoring your work capacity, or live in the margins of society; only losing productivity *while* working exempts from that maxim.<sup>304</sup> At the same time, disabled veterans' productivity was taken for granted, as if "once a soldier—always a soldier."

Second, the rationale of dignity, integration, and participation that disabled veterans demanded and achieved as early as in 1949 was not extended to all people with disabilities neither in the eyes of policymakers and the public at large, nor in the eyes of disabled veterans themselves. Most remarkably, the general disability community would need about four more decades to start fighting for the issues that disabled veterans accomplished long before then (e.g., not to be isolated and segregated but to remain part of the community, or to be active participants in the legislative process). During those years, it was almost unimaginable that the general community of people with disabilities would raise similar claims—not to mention succeed in their goal. It was only in the 1980s, and most notably during the 1990s, that additional disability-based associations started to use social change strategies similar to those of the ZDVO.<sup>305</sup> Until then, ZDVO was exceptional in the organizational landscape for its involvement in legislative processes and policymaking institutions.<sup>306</sup> Housing, employment, economic security, consultation, and participation—these are all on the current agenda of the disability movement in Israel, yet they are still highly debated issues.<sup>307</sup>

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302. See *supra* Section III.A.

303. See *supra* Subsection IV.B.3.

304. See *supra* Subsection IV.A.2.

305. On disability activism during the 1960s, see KRAMER, *supra* note 110. For a critical analysis of disability activism in the 1980s just prior to the introduction of disability rights, see Stanley S. Herr, *Human Rights and Mental Disability: Perspectives on Israel*, 26 *ISR. L. REV.* 142, 153-160 (1992). For a more general review of the changing forms of disability activism in Israel, see MOR, *supra* note 178, ch. 7.

306. KRAMER, *supra* note 110, at 59-69 (noting that only AKIM, a parents' association for children with developmental disabilities, exhibited a similar high level of involvement, and stressing that AKIM's activities "can be viewed as the exception that proves the rule" compared to other associations that are concerned with the needs of the general population of people with disabilities).

307. Thus, the Equal Rights for People with Disabilities Law, 1998, 5758-1998, S.H. 152 (ERPWDL) contains only part of the original provisions that the bill included. The parts that did pass as law include employment, accessible public transportation, and a section on general principles such as dignity and inclusion. It also establishes a mechanism for consultation with people with disabilities in future regulatory processes that concern their rights. On the ERPWDL, see Ariela Ophir & Dan Orenstein, *The Equal Rights for People with Disabilities Law, 1998: Emancipation at the End of the 20th Century*, in LIBER AMICORUM MENACHEM GOLDBERG 42 (Aharon Barak et al. eds., 2001) (Hebrew). In 2005 the ERPWDL was amended twice to include additional sections, one concerns

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Furthermore, it is clear that disabled veterans exerted themselves to improve their social conditions as disabled people only for their own benefit and not for the benefit of the disability community as a whole. The ZDVO did see the shared interests and experiences of IDF disabled veterans and the veterans of World War II, and actively worked to unite their associations by advocating their joint agenda, and claiming that “without the human bonds that tie us all to one big family of the handicapped, we might lose our moral source of strength.”<sup>308</sup> Nevertheless, it refrained from promoting the rights or benefits of other groups of people with disabilities and did not see them as part of this “one big family of the handicapped.”

My contention, then, is that the regime of benefits disabled veterans enjoyed, as well as their continued activism, played a crucial role in reinforcing that social hierarchy and in the continued exclusion of people with disabilities. This is what the benefits extended to World War II veterans and victims of hostile actions demonstrate: when groups of people with disabilities could associate themselves with disabled veterans, they were allowed to follow the Invalids Law’s scheme. They did so by advocating national values and distancing themselves from the general population of people with disabilities. For them, the Invalids Law became a model for mobilization, for the pursuit of their claims, and the fight for their place as deserving beneficiaries of the Israeli welfare system. In their struggle, they created for themselves an exception, a separate space in the public imagery, which was as close as possible to disabled veterans and as remote as possible from the “undeserving” segments of society.

The result was not only the further elevation of disabled veterans’ heroism, but also the continuing downgrading of other people with disabilities. Thus, an alarming outcome of their mobilization was the erosion of the work injury program’s status, as well as the decline in the prestige of National Insurance benefits. The various groups of people with disabilities who struggled to achieve disabled veterans-like benefits have perceived National Insurance benefits as low and demeaning in comparison to the heroism they believe they deserve to share with disabled veterans. Although that process was part of a larger one in which

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accessibility of facilities and services, and the second concerns accommodations in legal proceedings. The rest of the bill, including general provisions about housing and education, is still under debate and deliberation at the Knesset, waiting for its completion.

308. TRUE HEROES, *supra* note 250, at 24. The issue of uniting the various associations is mentioned for the first time already in 1951, when ZDVO warned that having separate associations for the handicapped is a “recipe for ‘brothers’ wars” (a Hebrew phrase relating to civil war among Jews), and declaring that “we will aspire with all our hearts to make true peace among all the handicapped people in the country.” *Id.* at 21 (emphasis added). In 1953 ZDVO successfully united with the veterans of War world II who fought with the Allied Forces or with partisan groups, *id.* at 24, and in 1956 with the veterans who participated in special brigades comprised of members of the pre-state Jewish community, *id.* at 31.

the value of labor has declined and social welfare lost its allure, it nonetheless contributed to the decline of work injury from a valued program of the National Insurance to a devalued group of welfare recipients.<sup>309</sup>

That result is indeed unfortunate, and it has far-reaching consequences. Although the work injury program has already played a dividing role in the disability community as the gatekeeper to civil dignity, it still could, and should, have represented a civil and progressive model of disability benefits.<sup>310</sup> In contrast, the Invalids Law as a model has no potential to become inclusive; it is inherently inaccessible to civilians unless they are engaged in some form of national activity. Furthermore, its exclusivity rests on the assumption that other disabled people receive less than disabled veterans.<sup>311</sup>

As this article comes to conclusion, the multifaceted picture of disability benefits' socio-cultural dynamics becomes clear. The competition among the various programs and groups revolves around not only scarcity of material resources but also a tightly bounded understanding of productivity that rests on the negation and denial of disability.

#### V. FIVE DECADES LATER

“We are given poor and miserable allowances so that we live and be silent. They say: ‘nobody can tell us that we are an immoral society, because you are alive.’ But what kind of life are we talking about here? I am struggling so that a handicapped can be part of society, and it starts with money and food. I want the disabled to live in dignity, and to be able to go to work and contribute to society.”<sup>312</sup>

“My feeling is that DF veterans would prefer to maintain the current situation forever. It is better to be a unique hero than merely a simple disabled person. It undermines the ideological ground under their wheelchair. Maybe this is why they do not cooperate with us. . . . They sit

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309. A striking recent example of that process was exhibited in a 2004 decision handed by the Supreme Court of Israel. In that case the association of the work-injured challenged a law that decreased the level of benefits to work-injured by four percent but did not change the level of benefits to disabled veterans. The Association of Victims and Widows of Work Accidents in Israel argued that equality requires treating all disability programs alike so that the decrease would apply to all. The Supreme Court held that there is a clear distinction between National Insurance programs (work-injury and general disability insurance) and other programs that express the “moral commitment of Israeli society” to those that “the circumstances of their injury [are linked to] their national-collective affiliation” (e.g. disabled veterans and Victims of hostile actions). H CJ 5304/02, *Ass'n of Victims and Widows of Work Accidents in Isr. v. Israel* § 8 [2004] (unpublished). The reasoning specifically excluded the work-injured from the more prestigious type of disability programs, those that involve national-collective values.

310. See *supra* Subsection IV.A.3.

311. See *supra* Subsection IV.B.3.

312. Hagar Yanai, *Things I Learned Sitting*, HA'ARETZMAG., Jan. 11, 2002, at 24-28 (spoken by Yoav Kraim, a disability activist, in a profile piece).

in silence in their golden ghetto. [They have a comfortable life] so why should they struggle for equality? . . . It makes me angry, precisely because I know that disability is a political condition. Our struggle will succeed only when IDF disabled veterans are a part of it. But this is a kind of secret that nobody talks about, and I am angry.”<sup>313</sup>

Five decades after the foundations of Israeli disability policy were laid, nothing much in the differentiated structure of disability benefits has changed. Two events could have led a new understanding of disability benefits that would have brought all people with disabilities together, or at least closer, but the opportunities were missed. The first event was the enactment of a National Insurance general disability insurance program in 1974. The second was the emergence of disability rights discourse and activism in the 1990s.

The 1974 disability insurance program<sup>314</sup> was supposed to represent a shift from Sa’ad to National Insurance, from social neglect to state responsibility, from existential insecurity to economic security. Yet the new program has failed to bring the message of universality, did not bridge the gaps and the spatial separation between the eighteen programs that existed at that time and that distinguished between the various categories of people with disabilities.<sup>315</sup> The great expenditure that such fundamental administrative reform would require indeed played a role in that decision.<sup>316</sup> Yet apparently the reluctance to do so was most fundamentally about the unwillingness to either tighten the privileged groups’ privileges or to expand those privileges to additional people with disabilities, as Roter and Shamai, two researchers at the National Insurance Institute, testified soon after its enactment.<sup>317</sup> Their account reveal that a primary reason not to unify the system was to maintain the separation between the majority of disabled people and the other more privileged groups.

In addition, the new disability insurance maintained the structure of a public assistance program: its rationale was need, not insurance.<sup>318</sup> It also adopted rigid eligibility criteria<sup>319</sup> that left many people with disabilities outside the system.<sup>320</sup> Furthermore, the program adopted a minimal

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313. Lili Galili, *Life Outside the Golden Ghetto*, HA’ARETZ, July 31, 1998, at B7 (spoken by Leah Lior, a disability activist, in a profile piece).

314. National Insurance (Amendment No. 13) Law, 5733-1973, 27 L.S.I 233 (1972-73).

315. Arie L. Miller, *A New Look on Disability Insurance*, 22 BITAHON SOTSIALI 5, 8 (1981) (Hebrew).

316. Raphael Roter & Nira Shamai, *Disability Insurance*, 6-7 BITAHON SOTSIALI 18, 20 (1974) (Hebrew).

317. *Id.* at 19-20.

318. Gal, *The Perils of Compensation*, *supra* note 109.

319. *Id.*; Miller, *supra* note 315.

320. For a general review of those groups, see PROCACCIA & MILLER, *supra* note 120, at 36-42.

approach to disability allowances, which were provided on a flat-rate basis that is equal to twenty-five percent of the average wage in Israel, a sum lower than Israel's minimum wage and insufficient for dignified living.<sup>321</sup> The amount of actual allowance varied according to the level of disability so that a person with fifty percent level of disability received twelve and a half percent of average wage as her sole source of income. The result was that, at the time of the enactment of the law, the basic level of allowance to people with disabilities was the lowest among all National Insurance Institute programs, lower than that guaranteed in elderly and survivors' insurance. It was, in fact, almost the same as the level of Sa'ad assistance that preceded the disability insurance program, and sometimes even lower.<sup>322</sup>

Another inequality among the programs is the minimal level of in-kind benefits that the beneficiaries of disability insurance receive. Only attendance allowance (an allowance that provides the means to hire a personal caretaker) and minimal vocational training programs were provided and a mobility allowance was added a few years later following campaigns of people with mobility impairments.<sup>323</sup> In comparison, the work-injury program offers generous medical treatment benefits that extend beyond restoring work capacity, and the Invalids Law provided comprehensive services in additional fields such as education, and assistance in employment and housing and which were supplemented by services provided by ZDVA.

In the broader framework of social security benefits, the material insufficiency of the 1974 disability insurance becomes even clearer. In 1974, there was still no supplemental income program, no unemployment insurance, no health and sickness insurance, and only a limited program of old-age insurance, which was also criticized as a charity-like mechanism.<sup>324</sup> A comprehensive and complete social insurance system could have mitigated some of the material gaps that people with disabilities faced.<sup>325</sup> Yet in its absence, the content of each particular program became crucial. The result was that despite the shift from Sa'ad to social insurance, disability insurance remained the most inferior in the

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321. A single person's full allowance was originally even lower, twenty percent of average wage, but the rate was amended in 1975 to twenty-five percent of the average income. According to Procaccia and Miller, "someone who earns 20% of average income is below what is usually seen as the poverty line." *Id.* at 70.

322. PROCACCIA & MILLER, *supra* note 120, at 70.

323. KRAMER, *supra* note 110, at 60; Arie Rimmerman & Stanley S. Herr, *The Power of the Powerless: A Study on the Israeli Disability Strike of 1999*, 15 J. DISABILITY POL'Y STUD. 12, 15 (2004).

324. See DORON & KRAMER, *supra* note 78, chs. 6-7, for a detailed analysis of the elderly program, in which they reach that conclusion.

325. The records of the Knesset reveal some of the concerns and debates regarding those issues. See DK (1973) 2576-84, 4031-37.

hierarchy of disability-based programs.<sup>326</sup> Furthermore, the condescending attitudes against “unproductive” members of society, and the underlying negative assumptions towards disability as a state of imperfection, have remained intact.<sup>327</sup>

The second opportunity to provide comprehensive insurance for all people with disabilities, to promote social security based on principles of equality and human dignity, was presented during the 1990s with the introduction of disability rights.<sup>328</sup> The disability rights project aimed at changing the living conditions of people with disabilities and to transform the conditions of ableism through structural social changes. But it too neglected to address disability benefits as a major site where the power system of dis/ability is constituted.<sup>329</sup> Even through Israeli disability rights advocates did promote social services as a way to make rights meaningful for people with disabilities, the structure and level of basic disability allowances remained outside the scope of their agenda.<sup>330</sup>

Together with the maintenance of material disparities the symbolic and political gaps have also remained largely the same. Although the disability rights language has brought a change in that regard, as it presented people with disabilities as equal citizens that society accounts for their marginalization, neither disabled veterans nor the work-injured have joined the rights effort. Instead, they remained distanced and alienated.

Only in 1999 did the poor socioeconomic conditions of people with disabilities penetrate the national agenda, as a thirty-five day strike by people with disabilities spurred strong and compassionate public

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326. Lower than the beneficiaries of the disability insurance program were those who were left outside its scope.

327. Doron and Kramer mention a poll that the Sa'ad Ministry conducted in 1970, according to which thirty-seven percent of the Israeli population believed that Sa'ad allowances discourage people from wanting to work. DORON & KRAMER, *supra* note 78, at 35.

328. See the following list of documents: Equal Rights for People with Disabilities Bill, 5756-1996, H.H. 628 (1996) (presenting the original bill that was submitted to the Knesset in 1996); PUB. COMM. FOR A COMPREHENSIVE REVIEW OF THE LEGISLATION REGARDING PEOPLE WITH DISABILITIES, REPORT (1997) [hereinafter PUBLIC COMMITTEE REPORT] (presenting the report of a Committee that was nominated following the submission of the Equal Rights for People with Disabilities Bill and that created a new, updated version of the Bill); Equal Rights of People with Disabilities Law, 5758-1998, S.H. 152 (1998) (the original law that included only four chapters of the revised version of the bill); and Equal Rights of People with Disabilities (Amendment No. 2) Law, 5765-2005, S.H. 288 (2005) (enacting an amendment that includes a comprehensive chapter on accessibility).

329. The reasons for that are beyond the scope of this article. But suffice it to say that the civil rights model was in total antagonism to such a provision and that social rights proponents as well were conflicted about the utility of rights in the field of disability allowances. See Neta Ziv, *Disability Law in Israel and the United States—A Comparative Perspective*, 1999 ISR. Y.B. ON HUM. RTS. 171, 172-74 (discussing the civil rights approach to disability); Neta Ziv, *People with Disabilities—Between Social Rights and Existential Needs*, in ECONOMIC, SOCIAL, AND CULTURAL RIGHTS IN ISRAEL 813 (Yoram Rabin and Yuval Shany eds., 2004) (Hebrew) [hereinafter Ziv, *Social Rights and Existential Needs*] (discussing the disutility of rights language in the field of disability allowances).

330. Ziv, *Social Rights and Existential Needs*, *supra* note 329.

support.<sup>331</sup> While the strike started with a broad agenda, including issues of accessibility, housing, and other disability rights issue, eventually it essentially became a struggle over disability benefits—disability insurance stipends, mobility allowances, and personal attendance allowances, their low rates, narrow scope, and outdated structure.<sup>332</sup> Followed by another strike in 2001-2002, the two campaigns have brought some important changes in the scheme of benefits for disability insurance recipients.

Nonetheless, the differentiated structure of disability benefits has remained intact for more than five decades and no meaningful change is within sight. The legalization and institutionalization of the ableistic power structure that underlay Israeli society in its first decade became an arena in which disability continues to be constituted as a state of inferiority and worthlessness.

#### CONCLUSION

“The question should be asked: are the generally disabled the forgotten sons of Israeli society, or is the blood of the other disabled more red?”<sup>333</sup>

The first decade of disability policy had a significant role in forming the meaning of disability in Israel. It did so mainly by institutionalizing and legalizing two hierarchies of power within which people with disabilities in Israel were located: between the disabled and the non-disabled, and among three main groups of people with disabilities, namely disabled veterans, work-injured, and the general population of people with disabilities. The structure of the welfare system and the hierarchy of benefits it dictated accorded a parallel pyramid of values and bodies created in Zionism. People with disabilities were excluded from Zionism’s vision of nation-building and personal reform through labor and defense, unless their disability was caused as a result of participating in fulfilling those very national missions. Moreover, even among these values a hierarchy existed between the more prestigious disabled veterans and the less valued, although not devalued, work-injured.

The result was that for the majority of people with disabilities Israel was not a modern welfare state, but a *charity*—a *Sa’ad—state*, which offered only minimal aid to prevent their starvation. Yet that state-run charity lacked even the compassion that charity has traditionally employed.

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331. Rimmerman & Herr, *supra* note 323, at 15.

332. Ziv, *Social Rights and Existential Needs*, *supra* note 329, at 840-45. For the original goals that the 1999 strike aspired to achieve, see Einat Fishbein, *The Disabled Are Opening a Struggle for Their Rights: We Have Nothing to Live On*, HA’ARETZ, September 29, 1999, at A6. On the narrowing of the scope of those demands and for the achievements of the strike, see Einat Fishbein & Moti Basok, *After 37 Days, the Disabled Achieved Their Demands*, HA’ARETZ, November 8, 1999, at A1. For a detailed analysis of the strikes’ background and achievements, see MOR, *supra* note 178, ch. 7, pt. B.d.

333. Miller, *supra* note 315, at 8.

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Instead of expressing a norm of mutual aid and solidarity, its bureaucratic structure exhibited mercy or pity, at the most, as it *deliberately* supplied less than dignified living, due to people with disabilities' perceived lack of productivity.

The law became a mechanism of division and fragmentation among the various groups of people with disabilities.<sup>334</sup> In acknowledging certain groups, it enabled them to flourish; in determining eligibility criteria, it defined their boundaries; and in setting different principles for each welfare program, it reinforced a social hierarchy by empowering the powerful and disempowering the marginalized. It contributed to the differentiation that largely reflected a values-based hierarchy of deserving and non-deserving people with disabilities, of the needed and the needy.<sup>335</sup>

The historical survey presented in this Article reveals the roots and sources for today's disability policies and politics and its implications are still relevant. While the ethos in Israel and its current image abroad proclaim that Israeli society "cares for the disabled," or at least committed to the wounded from wars and terror attacks, as many people tell me when the issue of disability rights is raised, it in fact does not accept—and is even intolerant of—disability. Thus, as this study shows, the assumption of care is based on the fundamental dichotomy between the "needed" and the "needy," the "worthy" and the "unworthy," and depends on the elevation of one part of these binaries at the expense of the other. Another indication is the state of accommodations and accessibility in contemporary Israel. Although limited accessibility laws existed in Israel since the 1980s, these laws were hardly enforced.<sup>336</sup> Even the 1990s struggles over disability rights have not yielded yet sufficient results. This insinuates that Israeli society is not so easily willing to accommodate itself to the needs of disabled people, and it therefore questions the alleged commitment to IDF disabled veterans.

I conclude with the claim that the distinction between the needed and the needy, the privileged and the common, should be abolished, or at least dramatically amended to exhibit less extreme differences among people with disabilities. The way to do that is to introduce the view that people are disabled not solely because of their biological conditions but largely due to a system of power that is manifested in societal categories and conventions whose effects can be mitigated and sometimes even

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334. Note that I do not claim that the law is inherently and unavoidably a mechanism of division and fragmentation, but rather that in that specific time, place, and context it exhibited those elements. Thus, for example, for disabled veterans, or later on for disability rights advocates, the law has served as a platform for coalition building and a terrain for social change as well.

335. I took the expression "the needed and the needy" from Gal & Bar, *supra* note 109. I find it nicely illustrative of the different social positions that the various groups of people with disabilities occupy in Israeli society.

336. PUBLIC COMMITTEE REPORT, *supra* note 328, at 42-45.

eliminated.<sup>337</sup> Such an understanding opens a window for creative and innovative new possibilities.

For the sake of opening such a discussion, I suggest that an alternative rationale for disability allowances could have been a “bridging the gap” principle.<sup>338</sup> Such an alternative could have yielded a generous mechanism of benefits, which, unlike the old compensation rationale that rests on the rejection of disability, would understand that society has responsibility for the exclusion of people with disabilities, and so would commit to inclusion; and that the many daily activities and basic pleasures that people with disabilities cannot enjoy are rooted not necessarily in their inherent difference, but in the way society’s institutions are designed—by the non-disabled and for the non-disabled. And it is that design that *socially* burdens people with disabilities.

The turn from viewing disability as the problem, to analyzing ableism and the power relations within which disability is constituted, characterizes the disability rights era. Yet the shift to rights carries the risk of neglecting welfare. Thus, disability rights advocates tend to be conflicted about, if not entirely oppose, disability allowances policies, arguing that they reinforce the marginality of people with disabilities.<sup>339</sup> Nonetheless, the reality of poverty and unaccommodated workplaces as well as the realization that welfare law is a major site of production of meaning, calls for critical engagement with those issues. The meaning of disability cannot be transformed without transforming the structure of welfare.

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337. See *supra* Section I.A.

338. This is a rationale that the disability movement in Israel currently advocates in its struggles to improve the welfare system (based on materials and interview with an organization called Campaign for Handicapped Persons in Israel (*Mateh HaMa'avak shel HaNechim BeIsrael*), which was leading some of the recent campaigns of people with disabilities to improve their welfare benefits).

339. See *supra* note 66.